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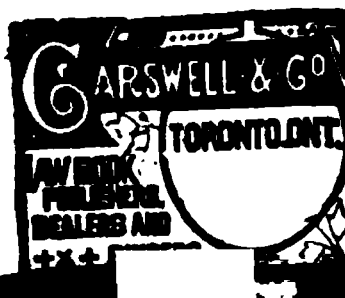
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REPORTS OF CASES
DECIDED IN THE
2491
COURT OF APPEAL,

DURING PART OF THE YEAR 1889.

REPORTED UNDER THE AUTHORITY OF
THE LAW SOCIETY OF UPPER CANADA

VOLUME XVI.

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OF THE
COURT OF APPEAL
DURING THE PERIOD OF THESE REPORTS.

THE HON. JOHN HAWKINS HAGARTY, C. J. O.
“ “ **GEORGE WILLIAM BURTON, J. A.**
“ “ **FEATHERSTON OSLER, J. A.**
“ “ **JAMES MACLENNAN, J. A.**

Attorney-General :
THE HON. OLIVER MOWAT.

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ERRATA

Page 135, *delete* fourth line from bottom.

“ 208, line 7 from top, for “defendant” read “plaintiff.”

“ 383, line 24, for “quashing it. The trespass” read “quashing if the trespass.”

ONTARIO APPEAL REPORTS.

ARCHBOLD v. THE BUILDING AND LOAN ASSOCIATION.

Mortgagor and mortgagee—Redemption—Six months' notice or six months' interest after default.

THIS was an appeal by the plaintiff from the judgment of the Queen's Bench Division, reported 15 O. R. 237, and came on to be heard before this Court (BURTON and OSLER JJ.A., ROSE and MACMAHON JJ.) on the 21st September, 1888.

S. H. Blake Q.C. and *Foy* Q.C. for the appellant.
Allan Cassels for the respondents.

December 22nd, 1888. THE COURT allowed the appeal with costs, holding that upon the evidence the parties after the maturity of the mortgage continued to deal upon the terms therein contained as far as applicable, and therefore that the option to pay off at any time the moneys secured by the mortgage still operated after maturity in favour of the plaintiff. (a)

(a) The questions of law involved in this case are no longer of general importance, in view of the Act 51 Vic. ch. 15 (O.)

**ADAMS V. THE WATSON MANUFACTURING COMPANY
(LIMITED).**

Amendment—Adding parties—O. J. A. M. R. 103—Costs.

THIS was an appeal by the plaintiff from the judgment of the Queen's Bench Division, reported 15 O. R. 218, and came on to be heard before this Court (HAGARTY C. J. O., BURTON, OSLER and MACLENNAN JJ.A.) on the 23rd November, 1888.

G. T. Blackstock for the appellant.
John Crerar for the respondents.

December 22nd, 1888. THE COURT dismissed the appeal with costs, being unanimously of opinion that, under the circumstances set out in the report of the case in the Court below, the terms as to payment of costs, imposed as a condition precedent to being allowed to amend, were proper.

DUNCAN V. ROGERS.

Way—Easement appurtenant to land conveyed—Agreement, construction of by Court.

THIS was an appeal by the plaintiff from the judgment of the Common Pleas Division, reported 15 O. R. 699, and came on to be heard before this Court (HAGARTY C. J. O., BURTON, OSLER and MACLENNAN, JJ.A.) on the 21st November, 1888.

Fullerton and W. Nesbitt for the appellant.

Tilt Q.C. for the respondent.

December 22nd, 1888. THE COURT allowed the appeal with costs, being unanimously of opinion that upon the evidence it was clear a defined right of way existed at the time of the grant to the plaintiff, and that under the terms of the grant it passed to him. The COURT were also of opinion that the finding of the jury as to the location of the extension of the lane should not have been disturbed, the written agreement in regard to this extension being ambiguous, and both parties having given evidence as to its real meaning, and allowed the question to be submitted to the jury.

GREEN V. THE CORPORATION OF THE TOWNSHIP OF ORFORD.

*Municipal corporation—Drainage—Work done in excess of contract—
Necessary work—Liability of corporation.*

THIS was an appeal by the defendants from the judgment of the Common Pleas Division, reported 15 O. R. 506, and came on to be heard before this Court (HAGARTY C. J. O., BURTON, OSLER and MACLENNAN JJ.A.) on the 30th November, 1888.

W. R. Meredith Q.C. and *Douglas* Q.C. for the appellants.

Moss Q.C. and *Shoebotham* for the respondent.

December 22nd, 1888. THE COURT allowed the appeal with costs, being of opinion that the work in question was work that the plaintiff was bound to perform under the contract itself.

Quære. Whether the work in question was in any event “necessary” in such a sense as to impose liability for payment therefor upon a municipal corporation without an express contract. The correctness of the decision of the Court below upon this point doubted.

PRATT V. THE CORPORATION OF THE CITY OF STRATFORD.

Municipal corporation—Jurisdiction over streets—Changing level of street—Damage to adjacent owners—Absence of by-law—Remedy by action or arbitration.

Held, (BURTON, J. A., dissenting) affirming the decision of BOYD, C., that a municipal corporation can exercise and perform their statutable powers and duties in repairing highways or bridges or erecting a new bridge instead of an old and unsafe one without passing a by-law therefor, and that the plaintiff, whose premises were "injuriously affected" by the level of the street on which they fronted being raised in order to construct a proper approach to a bridge that the defendants were lawfully re-building, could not maintain an action against the defendants, but must, in the absence of any negligent construction, proceed under the arbitration clauses of the Municipal Act R. S. O. ch. 184, notwithstanding the absence of any by-law for the prosecution of the work.

Per BURTON, J. A. There was no obligation cast upon the defendants to re-build the bridge at such a height as to necessitate a change in the level of the street, and therefore the defendants could not lawfully change the level of the street without passing a proper by-law for that purpose.

Yeomans v. The County of Wellington, 4 A. R. 301, followed; *McGarvey v. The Town of Strathroy*, 10 A. R. 636, and *Adams v. The City of Toronto*, 12 O. R. 243, discussed; *Van Egmond v. The Town of Seaford*, 6 O. R. 610, distinguished.

THIS was an appeal from the judgment of BOYD C., *Statement* reported 14 O. R. 260.

The action was brought by the plaintiff as the owner of certain property situated on Huron street in the city of Stratford, against the corporation of that city for damages suffered by him in consequence of the defendants having raised the level of the street in front of this property, in order to make a proper approach to a bridge that they were rebuilding over the river Avon, and in consequence of their having also built a wall in front of part of this property.

Huron street is one of the chief thoroughfares of Stratford, and formerly crossed the river Avon by a Howe truss bridge built on the level. This bridge was condemned as unsafe, and it was decided to build a new bridge of stone. This necessitated arching of the bridge, and consequently a change in the level of the approach thereto; and the level of that part of the street in front of

Statement.

the plaintiff's property was raised about four feet. The defendants also built for the purpose of making the approach safe, a stone wall about four feet high on each side of the approach to the bridge, running from the bridge to a point opposite about the centre of the plaintiff's property. Access to the plaintiff's property was thus materially interfered with, and its value for business purposes much lessened.

The defendants entered upon the construction of the bridge and the approach thereto without passing a by-law for the purpose. No negligence in construction was shewn.

By the Act incorporating the city of Stratford, 48 Vic. ch. 72 (O.), the construction of a new bridge was impliedly authorized, but not expressly directed.

The action was tried on the 29th April, 1887, before Boyd C., and subsequently on the 27th May, 1887, judgment was delivered in favour of the defendants, dismissing the action, with costs.

From this judgment this appeal was brought, and came on to be heard before this Court (HAGARTY C. J. O., BURTON, OSLER and MACLENNAN JJ. A.) on the 14th November, 1888.

W. Cassels Q.C. for the appellant. In the absence of any express by-law authorizing the raising of the level of the street the defendants' action in so raising the level was illegal. The general statutory powers of the defendants are not so extensive as to enable them to undertake a work of this kind to the prejudice of private rights without first passing a by-law for the purpose. There was no necessity for raising the level of the street, as a suitable bridge might have been constructed at the same level as that of the former structure. The plaintiff is not bound to resort to the arbitration clauses of the Municipal Act, but is entitled to bring this action. The damage sustained is of the nature of a continuing damage, and the proper and only remedy is by action. There can be no arbitration in the absence of a by-law : *Van Egmond v. Town of Seaforth*, 6 O. R.

599 ; *McGarvey v. Town of Strathroy*, 10 A. R. 631 ; *West Argument v. Town of Parkdale*, 12 S. C. R. 250 ; *Adams v. City of Toronto*, 12 O. R. 243.

Idington Q.C. for the respondents. By their Act of Incorporation, 48 Vic. ch. 72, the duty of constructing the bridge is cast upon the defendants, and the change complained of was effected in discharge of that duty. The matter was not one as to which the corporation had any option to exercise, and it is only in case of the exercise of an optional right that a municipal corporation need pass a by-law to legalize its actions and define its duties. Besides, this was a necessary repair of a highway. The absence of a by-law in the present case does not entitle the plaintiff to bring an action, but the remedy, if any, is by way of proceedings under the arbitration clauses of the Municipal Act. Even if in default of a by-law the plaintiff is without remedy under the arbitration clauses, still the want of such remedy does not entitle him to a remedy by way of action. He has no common law right to the continuance of the street at the same level as when he purchased.

Cassels in reply.

December 22nd, 1888. HAGARTY C. J. O. :—

By the Special Act (48 Vic. ch. 72) the corporation were empowered to pass by-laws for the issuing of debentures (sec. 14 et seq.), to raise \$215,000 to be applied to pay existing debentures, and to erect the bridge on Huron Street (sec. 17).

Section 25 declared it not necessary to obtain the assent of the electors to the passing of any such by-law.

It seems clear in this that having passed the by-law for the issue of the debentures, in other words, for raising the money, the corporation might at once proceed to apply the money to the two specified purposes, the redemption of outstanding debentures and the erection of the bridge. And I do not see why they had not power and right to contract for and erect the bridge mentioned in the statute without having to pass a by-law therefor.

Judgment.

HAGARTY
C.J.O.

Apart from the Special Act I think the learned Chancellor rightly held that they could exercise and perform their statutable powers and duties in repairing highways or bridges, or erecting a new bridge, instead of an old and unsafe one, without passing a by-law therefor. It need hardly be argued that they could not fill up a hole in a highway or substitute sound for rotten planks in a bridge without a by-law. It is only a question of degree, not of right or principle, between the expenditure of \$50 or \$100 for this lawful and necessary purpose, and of \$15,000 for the substitution of a necessary new and improved bridge for the unsafe old structure.

In the absence of any negligent construction or execution of a lawful act by the corporation, the only apparent remedy for the owner of property injuriously affected thereby, would be by compensation under the statute. The act being lawful as authorized by the statute the party injured can only resort to the compensation provisions. We have decided more than once, that in such a case the remedies by action and for compensation are not concurrent, or to be resorted to at the option of the claimant: *Preston v. Corporation of Camden*, 14 A. R. 85.

It remains to consider the main objection urged by the plaintiff, namely, that he cannot resort to a claim for compensation as there was no by-law.

It must be an unfortunate state of the law if compensation could not be obtained when the injury was caused by the act of the corporation, simply because they did not think it necessary to pass a by-law to do work which they could lawfully do without such a formality.

In the very fully argued and considered case in this Court, of *Yeomans v. County of Wellington*, 4 A. R. 301, the injury done to the plaintiff was almost exactly similar to the case before us, and the work causing the injury was executed by the corporation without a by-law. The parties had agreed to refer the claim to arbitration, and an award was made against the defendants, which they sought to set aside.

The arguments of the experienced counsel as reported have no reference to the non-existence of any by-law. The careful judgment of Gwynne J., does not notice the point as directly affecting his decision. But he fully discusses the previous decisions as to acts done under a by-law and without a by-law, and, as I fully agree with the conclusion he draws, I need not repeat his words.

Judgment.

HAGARTY
C.J.O.

In appeal, confirming his judgment, the elaborate and instructive judgment of Moss C. J. does not notice the point beyond stating that the corporation "in the exercise of their general jurisdiction over roads, and without passing any by-law had raised the original allowances for road about four feet, &c."

The judgment fully affirms the right to compensation. In the conclusion of his very able and instructive judgment the learned Chief Justice says: "Now whence does the corporation of the county derive the authority which entitles it to build this embankment, and place these railings upon the highway? Is it not solely by virtue of the jurisdiction with which it is clothed by the statute? It has no inherent right to interfere with highways, and, but for the statute, its officers would be mere trespassers in executing these works. By its operations in the exercise of that power the respondent's land has been injuriously affected, and while the law prevents her from bringing an action against the corporation it is no longer so unjust as to refuse her compensation."

I cannot read the judgment of Gwynne J., and of this Court affirming it, without feeling that the absence of a by-law in no way affected the right to compensation.

In *Adams v. City of Toronto*, 12 O. R. 243, the decision was on demurrer. It is not stated expressly whether the work was done under a by-law. The defence demurred to averred the doing of the work (as here, raising the street), but did not state a by-law, and the causes of demurrer which are very full, take no exception to the absence of any averment of a by-law. Wilson C. J. held that on the defence disclosed, the action must be dismissed,

Judgment.

HAGARTY
C.J.O.

as the plaintiff's remedy was by compensation under the statute.

In *Ayers v. Corporation of Windsor*, 14 O. R. 682, my brother Rose considered that a by-law was necessary.

I agree with the learned Chancellor, that we must not read the statute so very narrowly as to hold that the right to compensation under its provisions, must necessarily be limited to the case of injuries sustained in execution of work authorized by by-law.

Section 486 of Municipal Act, 1883, 46 Vic. ch. 18, declares :

"Every council shall make to the owners or occupiers of, or other persons interested in, real property entered upon, taken or used by the corporation in the exercise of any of its powers, or injuriously affected by the exercise of its powers, due compensation for any damages, * * necessarily resulting from the exercise of such powers * * and any claim for such compensation, if not mutually agreed upon, shall be determined by arbitration under this Act."

Here we find the general right and principle established in plaintiff's favour. It seems clear to me that acts which the corporation may and must occasionally perform at their peril, may be done without by-law, and may injuriously affect the owners of realty. Then we turn to the arbitration clauses.

Section 389 directs that in cases where arbitration is directed by this Act either party may appoint an arbitrator, and give notice in writing to the other party, calling upon such party to appoint an arbitrator, &c.

Section 396 directs that if the owner, &c., or the head of the council, omits to name an arbitrator within seven days after notice, &c., the County Judge may appoint an arbitrator to act for the party failing to appoint, &c.

But the appellants insist that the arbitration machinery appointed by the statute cannot work or be set in motion except where there is a by-law.

Section 393 directs that if after the passing of the by-

law the person interested appoints an arbitrator, and gives notice to the head of the council, the latter, if authorized thereto by by-law, shall appoint a second arbitrator, &c., "and shall express clearly in the notice what powers the council intends to exercise with respect to the property, describing it."

Judgment.

HAGARTY
C.J.O.

It is evident that this section applied to cases where there was a by-law, and certain powers thereby to be exercised would either take or use, or injuriously affect real property; the specific notice prescribed by the words just quoted shews this.

The Chancellor notices the history of this section, and his own view thereupon. It was unfortunate that the draftsman, when the words "injuriously affected," were introduced, did not, as is suggested, provide directly for the appointment of arbitrators where no by-law was passed or was necessary.

But we must not defeat or destroy the broad right to compensation created by the statute by any such rigid adherence to mere form.

The sections may well be read as merely providing a course of proceeding when a by-law had been passed, but leaving the arbitration machinery untouched where no by-law existed or was required.

The statute properly provides that the head of the council must be authorized by by-law to name an arbitrator.

If they can lawfully erect the new bridge without a by-law, I cannot see why the elevation or depression of the highway, to give the necessary approach, must at once convert them into wrong-doers, and liable to an action instead of a settlement by statutable arbitration of a claim for injuriously affecting the plaintiff's property.

Granted that they could, without a special by-law, expend a large sum in substituting a costly new bridge for the old one, not raising or lowering the approaches, I cannot see why the change in the level, proper and necessary for the improved structure, at once alters their position.

Judgment.

HAGARTY
C.J.O.

The plaintiff, as I read the statute, is entitled to compensation, by-law or no by-law.

I cannot see any sensible distinction in principle between a four feet and four inch change of level. The most ordinary repair to a highway may involve constant change of elevations, consequent on the filling up of holes or marshy spots or the laying down of new material for the road, and it is quite possible that such alterations may injuriously affect the approach to buildings or lands.

If the plaintiff's contention be sound, no such change, however necessary, could be made without this formality.

I think we should seriously hamper the action of municipalities in dealing with their roads and bridges in adopting any such view.

It is said in the judgment in *Jones v. Stanstead R. W. Co.*, L. R. 4 P. C. 98. at p. 115, and cited approvingly in *Corporation of Montreal v. Drummond*, 1 App. Cas. 384:

"The claim for damages in an action (in this form) assumes that the acts in respect of which they are claimed are unlawful, whilst the claim for compensation under the Railway Acts, supposes that the acts are rightfully done under statutable authority; and this distinction is one of substance, for it affects not only the nature of the proceedings, but the tribunal to which recourse should be had."

I hold in the present case that the acts in consequence of which plaintiff claims damages were lawfully done by the defendants under their statutable powers and duties; that they had the right to do these acts without the formality of a by-law, as part of the ordinary duties imposed on them in the maintenance of roads and bridges.

I think they had the right to build this bridge directly derived from their incorporation Act. They had the required funds in hand, and, as I read the statute, they had this right directly to proceed to build this bridge without any by-law, even if required by the Municipal Act. And if in execution of such power they injuriously affect plaintiff's property in making suitable approaches to the bridge, in the absence of negligence, the only remedy is by compensation ascertained by arbitration.

In addition to the cases cited I may note *Ferrar v. Commissioners of Sewers*, L. R. 4 Ex. 1, reversed in Ex. Ch. *ibid.*, 227; *Dungey v. Mayor, &c., of London*, 38 L. J. C. P. 298. Judgment. HAGARTY
C.J.O.

OSLER J. A. :—

In my opinion the question involved in this appeal has already been so far decided by this Court as to preclude us from treating it as an open one on this occasion.

In the case of *Yeomans v. County of Wellington*, 43 U. C. R. 522, there was a motion by the defendants to set aside an award made under the arbitration clauses of the Municipal Act. The County Council had built a new bridge over a river in an incorporated village in the county, and two years afterwards, in order to put the road in repair, had raised it about four feet to make it level with the bridge, and protected it with a railing on each side.

This, as is noticed in the report, was done without any by-law, and in pursuance of what was supposed to be the duty of the county. The only difference in this respect between that case and the present is, that here the raising and grading of the highway appears to have been done at the same time as, and as part of the work connected with, the construction of the bridge. The effect of the improvements upon the plaintiff's property, and the injury complained of by him, is precisely the same.

The first and principal ground of the motion was, that no injury had been shewn to any property of Yeoman's for which she was entitled to compensation, and that the alleged injury was caused by work done upon and within the limits of the highway in pursuance of the duties of the municipality, and with due care and skill.

Gwynne J. in giving judgment says that the question raised in the case is, whether the owners of property abutting on a public highway are entitled to compensation under section 373 of the Municipal Act of 1873, (now section 483 R. S. O., ch. 184). After citing and discussing the cases

Judgment.

ONLER
J. A.

of *Reid v. City of Hamilton*, 5 C. P. 269; *Croft v. Town of Peterborough*, 5 C. P. 35; and *Regina v. County of Perth*, 14 U. C. R. 156, he observes, p. 529, that they no longer affect such a case as that before him, "for without prejudice to their claim for compensation it may well be conceded that the parties injured here, namely, the proprietors of the land abutting on the highway which has been raised, have no cause of action upon the case, as for wrong, against the municipality," and that, as he afterwards explains, is because, and only because, the works complained of were justified or authorized by the Act of Parliament, that is to say, the Municipal Act.

Then, applying the rule established in the leading case of *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243, to which now may be added that of *Caledonian R. W. Co. v. Walker's Trustees*, 7 App. Cas. 259, he proceeds to shew that inasmuch as but for the legalization of the works by Act of Parliament an action would have lain at the suit of the abutter for the alteration of the highway, such person is a person injuriously affected by the exercise of the powers of the corporation, and is consequently entitled to compensation under the provisions of the Act.

The defendants appealed to this Court, and the judgment of Mr. Justice Gwynne was unanimously affirmed: 4 A. R. 301, upon the same grounds. I can, of course, only deal with the decision as I find it reported. Moss C. J. speaks of the work having been done by the appellants "in the exercise of their general jurisdiction over roads, and without passing any by-law," and his remarks in applying the test approved of in the *Metropolitan Board of Works v. McCarthy*, *supra*, may be quoted. He says: "Would not the corporation be liable to an action at law, but for the legalization of their proceeding, and their consequent protection by statute? It is conceded that if this alteration had been made in the road by a private individual for his own convenience or advantage he would have been liable to an action. He would have inflicted an injury upon the respondent without lawful authority. Now

whence does the corporation of the county derive the authority which entitles it to build this embankment, and place these railings upon the highway? Is it not solely by virtue of the jurisdiction with which it is clothed by the statute? It has no inherent right to interfere with highways, and but for the statute its officers would be mere trespassers in executing these works. By its operations in the exercise of that power the respondent's land has been injuriously affected, and while the law prevents her from bringing an action against the corporation, it is no longer so unjust as to refuse her compensation."

Judgment.

OSLER
J. A.

When the learned Chief Justice says that the corporation would be mere trespassers but for the statute, I understand him to mean not technically trespassers *qua* the abutter, who has no right of property in the road, but simply that they would be tortfeasors, or in the position of a stranger doing an unauthorized act.

I have referred at some length to this case for the purpose of shewing that it is, so far as this Court is concerned, substantially decisive of the case before us. The sole question presented for decision was whether, on the facts there appearing, the land owner was entitled to compensation, *qua* statutory compensation under section 373 of the Municipal Act.

The fact that the work had not been done under a by-law lay upon the surface, and the objection now pressed upon us must have been present to the mind of the Court from the elaborate discussion of the cases in 5 C. P. Had it been thought that in consequence of the absence of a by-law the work could not be said to have been done in the exercise of the powers of the corporation, there was a plain ground for upholding the award as upon a reference of a cause of action against defendants as wrongdoers, but this is not suggested, and the whole *ratio decidendi* of the judgment is, that the plaintiffs were entitled to compensation in respect of land which had been injuriously affected by the exercise of the defendants' corporate powers. The work which caused the damage complained of in that case

Judgment.

OSLER
J.A.

was of precisely the same character, and done under almost precisely similar circumstances, as in the case at bar.

I think it may properly be regarded as a work incidental to the principal work, or as a work of necessary repair under secs. 530 or 531 (46 Vict. ch. 18, R. S. O. ch. 184). If so, a by-law was clearly unnecessary, and I cannot accede to the view that the statutory compensation is incident only to the exercise of the discretionary, as distinguished from what may be called the obligatory, powers of the corporation. I think we have no right to cut down the meaning of the plain words of sec. 483 in that manner.

Section 486 of 46 Vict. ch. 18, is the governing section as to the right to compensation, and I agree that the obligation to resort to arbitration does not in all cases necessarily depend upon the passage of a by-law. The observation made by me in *Van Egmond v. Town of Seaforth*, 6 O. R. 599, at p. 610, referred to in the judgment below, "that the compensation or arbitration clauses of the Act did not apply, as the works were not done in pursuance of a by-law," must of course be taken in reference to the case then in hand, which was not one for injuriously affecting the plaintiff's property. The defendants were sued for fouling a stream to the plaintiff's damage. Whether they could, in point of law, have acquired the right to do so by passing a by-law was not in question. But in the absence of one there certainly was no pretence that the act was done in pursuance of any power of the corporation so as to compel the plaintiff to proceed by arbitration. For the construction and application of the arbitration and compensation clauses as applied to cases of injuriously affecting property, I refer to the observations of Patterson J. A., in *Re McArthur and The Township of Southwold*, 3 A. R. 295.

Upon the whole it appears to me that we should accept the judgment of the Court in *Yeoman's Case*, in its entirety. Limited as it is in its effect to the exercise of corporate powers, whether permissive or obligatory, upon the highways which are by statute vested in the municipality, it

places the rights of the abutter and the corporation upon a convenient and intelligible footing; while any rule which would make it necessary for the latter to pass a by-law on every trifling occasion when a hill had to be cut down, or a hollow to be filled, in a city or country road, by statute labour, or otherwise, would prove extremely onerous and embarrassing.

Judgment.

 OSLER
J. A.

I think the appeal should be dismissed.

MACLENNAN J. A. :—

I am of opinion that this appeal should be dismissed.

The action is brought for damages alleged to be sustained by the plaintiff by the raising of the street in front of his property, four feet higher than its proper level, and the erection of a parapet wall on the edge of the street along part of his frontage of an additional height of four feet.

The injury complained of arises from the work itself, and not from negligence in doing it.

The question whether a roadside land owner who does not own the soil and freehold of the road *ad medium filum*, as is almost universally the case in England, could, by the common law, maintain an action against the authorities for raising the grade of the road in front of his land, is no longer open to discussion in this Court. The case of *Yeomans v. County of Wellington*, 4 A. R. 301, has decided this question in the affirmative, and the late case of *Preston v. Township of Camden*, 14 A. R. 85, decides that in the absence of negligence the only remedy is by arbitration under the Act.

It is not disputed that in this case the work was *de facto* done by the corporation, for it was done under a regular contract between the corporation and a person who did the work, and was duly paid for out of corporate funds.

It is said however that it was necessary for the corporation to pass a formal by-law for doing the work, and not having done so, what they did was illegal and wrongful, and that for that reason the plaintiff's remedy is by action and not by arbitration.

Judgment.
MAOLENNAN
J.A.

The question then for decision is, whether the corporation having done the work without passing a formal by-law for the purpose, did or did not do the work in the exercise of its powers within the meaning of section 483 of the Municipal Act. If they did, the judgment appealed from is right, if not, the appeal ought to be allowed.

I am of opinion that the proper conclusion is, that this work was done by the defendants in the exercise of their powers.

By section 527 of the Act, every public road, street, bridge, or other highway, is vested in the municipality subject to any rights in the soil reserved by the original owners of the land.

By sec. 530 the approaches for 100 feet on each side of all bridges under the jurisdiction of the municipality shall be *kept up and maintained* by the municipality.

By sec. 531 every public road, street, bridge, and highway shall be kept in repair by the corporation subject to penalty for neglect.

By sec. 550 the council of any city may pass by-laws for * * improving, repairing, and altering roads, streets, squares, bridges, &c., within the jurisdiction of the council; and sec. 483 enacts that every council shall make to persons injuriously affected by the exercise of its powers due compensation for the damages resulting from such exercise, to be ascertained by arbitration if not agreed to between the parties.

The City of Stratford was incorporated by the Act 48 Vic. ch. 72, and the preamble recites that it has become necessary for the corporation to erect a bridge on Huron Street over the river Avon, to cost not less than \$15,000, for which debentures of the corporation will have to be issued. It also recites that it was proposed to consolidate the debt of the corporation amounting to \$200,000, to add to it the \$15,000 for the bridge and to issue debentures for the whole. Sections 14 and 15 authorize the passing of a by-law for the issue of debentures to the amount of \$215,000, and sec. 17 enacts that the debentures and the

money to arise therefrom shall be applied in the redemption of the existing debentures and in the erection of the bridge referred to, and for no other purpose whatsoever.

Judgment.
MACLENNAN
J.A.

This Act was passed in March, 1885, and in August following the corporation entered into formal contracts for the erection of the bridge and for the work on the road within 100 feet on each side, which includes what is complained of by the plaintiff.

No formal by-law for doing this work was passed, and the clerk of the council accounts for this, saying that the money for the work was raised under the Act of incorporation. The bridge was built. It was made higher than the old bridge for sufficient reasons, and this made it necessary to grade the approaches up on both sides for the distance of 100 feet, and to protect them by the parapet wall complained of.

It is contended that for want of the by-law the work cannot be regarded as done by the corporation in the exercise of its powers.

I think this is altogether too narrow a construction to put upon the Act. When the Legislature amended the Act in 1873, they intended to give compensation where there was no right to it before, and directed that when not agreed to it should be ascertained by arbitration. It is said that exercise of powers means only their regular exercise, that is, when a formal by-law is passed. What reason can be suggested for excluding cases where such powers may have been exercised irregularly? The Legislature has not said it and I think the Court should not say it without some good reason.

Here the Legislature had declared that the erection of a bridge to cost not less than \$15,000, was necessary. It had authorized the raising of the money for the work, and declared that the money should not be applied to any other purpose. The money was raised, it may fairly be presumed, by a by-law as provided by section 14; and it may further be fairly presumed that the by-law stated the purpose for which the additional \$15,000 was required

Judgment.
MACLENNAN
J.A.

just as the Act of the Legislature did, though I do not think it necessary to rely on this presumption. A formal contract was then made for the work, that is, not only for the bridge, but for the approaches and the parapet, and the work was done and paid for.

Now when it is considered that the work was done upon land expressly vested in the corporation, that the erection of the bridge was declared to be necessary, and was otherwise facilitated by the Legislature, that repair both of the bridge and of the highway was not optional but obligatory on the council, and that moreover it was compulsory upon the municipality to keep up and maintain the approaches to the bridge for 100 feet, at each end, I think it is impossible to say that the work was not done by the corporation expressly and literally in the exercise of its powers. It may have been irregular not to pass a by-law. It would have been wiser to do so. But the Act does not say the regular exercise of its powers, and there was nothing in the nature of the work requiring a further by-law after the money had been provided. A by-law would have been the merest matter of form, and it is easy to see how it came to be omitted.

Now it seems to me that unless it can be said that there can be no such thing as an irregular exercise of its powers by a municipal corporation, or that an irregular exercise of it is no exercise at all—is null and void,—this case comes within sec. 483 of the Act, and the plaintiff must resort to arbitration for his injury.

I think that the Legislature having declared the bridge to be *necessary*, its erection became a duty of the corporation and obligatory upon them. Repair of bridges is obligatory by the general Act, sec. 531, and in my judgment the effect of the two enactments taken together clearly made the building of this bridge obligatory. I think also that the bridge having been erected, and being properly made higher than the old, the raising of the approaches became a duty under section 530.

I think too, that the raising of the grade of the road

where it approached the bridge and the construction of the parapet walls may both be regarded as acts of repair, the one required to make the road as convenient, and the other as safe, as it was before, and if so they were obligatory on the council and, with or without a by-law, had to be done. But without insisting that the acts were obligatory and not optional it is sufficient if they were authorized corporate acts, and I think they were.

Judgment.

MACLENNAN
J. A.

The case of *Croft v. Town of Peterborough*, 5 C. P. 35, is relied on for the plaintiff, but that case decided a different point, and is, I think no authority for the construction to be put upon section 483. The point there decided was, whether the corporation could, without a by-law, refuse and resist compensation altogether for a serious injury. The question there was upon an enactment authorizing injury to be done without making any compensation; whereas the question here is upon a section created for the very purpose of giving compensation and making it obligatory upon the council to pay it. In the former case justice required that the corporation should be held to a very strict observance of the authority which enabled them to do injury without compensation. But in the present case the same reason requires as full effect and meaning as possible to be given to the words of the Legislature.

The policy of the Legislature has always been to have such claims settled by arbitration and not by action, so that the advantage the claimant has derived from the work, may be set off against his injury, and a construction of the section should, if the language will admit of it, be adopted, which will give effect to the intention and policy of the Legislature in all proper cases, and the application of the section ought not to be left to depend on whether the act was done with all due formalities or not. The substance and not the form of the matter should be regarded, and should govern.

It was urged upon us that for want of a by-law the plaintiff could not get the benefit of the arbitration clauses

Judgment. of the Act, but I see no difficulty in his way on account of
MACLENNAN these supposed defects. I think the learned Chancellor's
J.A. exposition of these clauses is correct.

BURTON J.A. :—

The Act incorporating the city of Stratford may be put out of view as in no respect assisting the defendants. That Act simply provides that a portion of the debentures which the city authorities were thereby authorized to issue should be applied to the erection of a bridge, which under their municipal powers they had authority to erect. Their right to erect that bridge is not, and could not be, questioned.

It would have been a very different question, if the authority to erect this particular bridge, and its approaches as they have been made, had been derived solely from the Act of incorporation. In which case it is clear that no action would have been maintainable unless the works were improperly or negligently done, causing injury; nor would compensation have been recoverable in the absence of a provision in the statute to that effect.

But the right to maintain this action depends on the question of whether the act complained of—that is, the raising of the road some four feet higher than the original level in front of the plaintiff's premises—can, under the Municipal Act, be justified without a by-law.

It is claimed that the action is not maintainable upon one of two grounds; either that the work comes within the definition of statutory repairs; or, if not, then that the municipality had an inherent power to do it, and therefore that no by-law was necessary.

If it was a work of repair, I quite agree that no action could be maintained; but I go further, and hold that in such a case no compensation could be claimed.

I shall first state my reasons for this conclusion.

By the common law of England the charge of repairing highways and bridges lay upon the inhabitants of the

county or parish, and the only remedy for default was by information or indictment.

Judgment.

BURTON
J.A.

That obligation has, in numerous cases in England, been transferred to local boards, who are generally clothed with increased powers which they can exercise in their discretion, and at a very early day in this Province the possession of the highways was by statute declared, speaking generally, to be vested in the municipality in which they were situate, and the obligation to repair was cast upon them. Is there any good reason why the language of our Act should receive a different construction from that of precisely similar language transferring the common law liability to the local board? I can see none, and I shall presently refer to cases in which such words have been held in England to mean precisely what they say, viz., to keep the road in as good a condition as when it was dedicated to the public, or in which it was after being duly made and laid out.

I shall shew also by these decisions, that no compensation is given under these Acts for repairs made by the board in fulfilment of the duty thus cast upon them, and that compensation under those Acts is given only in those cases where increased powers are given, as, for instance, raising or lowering the grade of a street, which are held to be done in the exercise of the powers given by the Act.

That being the construction placed upon those Acts, what reason can be given for placing a different construction upon the clauses of our Act? Assuming this to be so, and the corporation being liable to keep the road in repair, and repair meaning what I have pointed out, I can scarcely conceive a case in which an individual could sustain such an injury as would call for compensation; whilst in practice, if such claims could be advanced, the annoyance and inconvenience would be such as to render it all but impossible to work the Municipal Act.

If it had been intended to give compensation in such cases, one would expect to find it in the same section which imposes the obligation to repair, and the language which

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BURTON
J. A.

would introduce a system so unusual, I may say unprecedented, should be perfectly clear and free from doubt or ambiguity.

In this connection I refer to *Regina v. County of Perth*, 14 U. C. R. 156, for the purpose merely of shewing from the remarks of Sir John Robinson how strong an opinion that learned Judge entertained (an opinion concurred in by the other members of the Court,) of the necessity of very clear language in an Act of Parliament to give a claim to compensation, even in cases of alterations in the highway not coming within the definition of ordinary repairs.

But the sections providing for compensation, so far from extending to cases in which the municipality are doing something which they are compelled by law to do, seem confined in express terms to cases in which they are doing something *in the exercise of their powers*. Now what is meant by the "exercise of their powers"? The very term implies volition, something which they can do, or refrain from doing; not something under compulsion, the omission to do which would render them criminally responsible. The doing of ordinary repairs can scarcely be held to be an exercise of a power where they are in fact done in fulfilment of a public duty imposed upon them by law.

I am therefore of opinion that if this was a work of ordinary repair, it would not be a case for compensation.

But can it be said to be a repair by any fair or reasonable interpretation of the Act? A case which may be usefully referred to in this connection, is *Burgess v. Northwich Local Board*, 6 Q. B. D. 264, 50 L. J. Q. B. 219, 44 L. T. N. S. 154, as pointing out the clear distinction existing between such repairs, the obligation to do which was transferred to them from the surveyor of highways, in the same manner as under our Act, sec. 391, and such acts as they did under the powers of the Act.

Lord Justice Lindley says, as I venture to say in speaking of our own Act: "In one sense, every thing the defendants did was in exercise of the powers conferred by the Act; but by the expression, 'exercise of the powers created

by the Act,' I understand, new powers created by the Act, and not powers simply transferred by the Act from the highway surveyor."

Judgment.

BURTON
J.A.

He then points out that the duty to repair and keep in repair, means "to keep the road as dedicated to the public, in such a state as to be safe and fit for ordinary traffic;" and that what was done in that case was merely to restore the road, not to raise it higher than when it was dedicated to the public, or when vested in the defendants; and so was such a repair as they were authorized to do strictly in performance of their statutory duty; but he proceeds to point out that, if they had raised the level, then it would have been something done in the exercise of the powers of the Act; and that the plaintiff would have been entitled to compensation, because his right to pass and repass from his premises to the road, would have been infringed upon, and he would, but for the statute, have been entitled to an action.

I find it difficult in principle to distinguish that case from the present.

There, as here, the streets were vested in the defendants, and placed under their jurisdiction, and upon them the obligation to repair which formerly rested upon the inhabitants at large was imposed. That in itself, I apprehend, would have given the entire control of the streets to them, and rendered them liable to keep them in repair, but would not have authorized them to change the level, but in addition to the duty formerly imposed upon the county or parish to keep the streets in repair, they were empowered to do acts which the county or parish had no power to do, and some of which in the absence of such express authority they would have had no power to do; these express powers were to cause the streets to be levelled, metalled, flagged, altered, and repaired, as occasion might require.

And there was a clause as in our own Act that when any person sustained any damage by reason of the exercise of any of the powers of this Act, he should be entitled to compensation, and it was there distinctly held that what

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But the right to maintain this action depends on the question of whether the act complained of—that is, the raising of the road some four feet higher than the original level in front of the plaintiff's premises—can, under the Municipal Act, be justified without a by-law.

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That being the construction placed upon those Acts, what reason can be given for placing a different construction upon the clauses of our Act? Assuming this to be so, and the corporation being liable to keep the road in repair, and repair meaning what I have pointed out, I can scarcely conceive a case in which an individual could sustain such an injury as would call for compensation; whilst in practice, if such claims could be advanced, the annoyance and inconvenience would be such as to render it all but impossible to work the Municipal Act.

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I find it difficult in principle to distinguish that case from the present.

There, as here, the streets were vested in the defendants, and placed under their jurisdiction, and upon them the obligation to repair which formerly rested upon the inhabitants at large was imposed. That in itself, I apprehend, would have given the entire control of the streets to them, and rendered them liable to keep them in repair, but would not have authorized them to change the level, but in addition to the duty formerly imposed upon the county or parish to keep the streets in repair, they were empowered to do acts which the county or parish had no power to do, and some of which in the absence of such express authority they would have had no power to do; these express powers were to cause the streets to be levelled, metalled, flagged, altered, and repaired, as occasion might require.

And there was a clause as in our own Act that when any person sustained any damage by reason of the exercise of any of the powers of this Act, he should be entitled to compensation, and it was there distinctly held that what

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BURTON
J.A.

founded on the fact that the streets are vested in the municipalities, and that it is declared that they are to have jurisdiction over them.

In the cases to which I have referred in the English Courts, the streets were in like manner vested in the local boards, and I have already pointed out the distinction which the Courts have drawn between those powers which are imposed upon them as obligations and those which they have the option of doing, the difference between those cases and this is that power is expressly given to do the very acts which in this Act the council are empowered to deal with by by-laws. I apprehend that if those Acts had stopped short at vesting the roads and giving them power and jurisdiction over them with the obligations to repair previously imposed on the surveyor of highways, they would not have had the power to change the levels.

It is a general and undisputed proposition of law that a municipal corporation, or other board, possesses and can exercise those powers only which are granted in clear and express terms, or which are necessarily or fairly implied in, or incident to, the powers expressly granted.

The vesting of the roads and giving jurisdiction over them might probably, without express enactment, render them liable to keep them in repair, but would not, I apprehend, in view of this well understood proposition, give them a power to alter the level.

Our Act, after declaring that the municipality should have jurisdiction—in itself a very innocent declaration meaning necessarily nothing more than that they shall have the management and control of the roads, which, as the decisions shew, would not authorize an interference with the levels—goes on to point out what that jurisdiction is to extend to. This is defined in sec. 550, and gives very extensive powers to the governing body to pass laws within certain defined limits, upon the passing of which the act authorized to be done becomes as valid as if authorized to be done by the Legislature.

It is said, I believe, that this section giving the power to

pass by-laws on the subject, is merely declaratory of the powers with which they are invested already.

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BURTON
J.A.

If they already had the power by reason of the roads being placed under their jurisdiction, where was the necessity of sec. 550? The Act has already said that any power to be exercised by the council shall be by by-law, and to hold that the power here given to pass by-laws, is merely equivalent to a declaration that they have the power, seems to me not only opposed to the plain, literal meaning of the sections, but to be a very clumsy mode of legislating, which I am not inclined to attribute to the careful framers of this important enactment, perhaps one of the most important that our Parliament has ever passed.

In England, we find that the obligation to repair, did not empower the parties charged with the duty, to alter the levels or widen the bridges; but in each case resort had to be had to the Legislature for special powers. As I read the Municipal Act, our Legislature has said this shall not be necessary, but we delegate certain limited powers to you, but we couple with it the condition that if, in carrying out the works which you can by enactment authorize, you do an injury to the land of an individual for which, but for that enactment, he would have an action, you must make him compensation.

I think this is the proper construction to be placed upon these sections, bearing in mind the rule of law I have referred to; and that any fair, reasonable doubt as to the existence of the power, is construed against the corporation.

Instead of enacting in the special Acts in England, that the board should have the power absolutely to do the act or acts referred to in it, our Legislature, having regard to the fact that the governing body are elected from year to year, has said we will place it in your power to do these things, provided the governing body has first deliberately adopted them by by-law.

It differs only in degree from the jurisdiction conferred by the Imperial Parliament upon the Parliament of the

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BURTON
J.A.

Dominion, and the Legislatures of the several Provinces; one being authorized to pass laws upon subjects of national importance, the other upon subjects of a local nature.

So here I should have thought it too clear for argument but for the doubts which have been thrown upon it, that what was intended was to delegate to the municipal council the right to legislate upon these subjects. That is the true, clear, and grammatical construction of the words used, intended, as I think, to obviate the necessity of applying to the Legislature for powers, as we see is the case in England, and at the same time not to give these powers generally, but only after the subjects had been discussed by the governing body, and a by-law passed with the prescribed formalities.

If that be the correct view, then it is clear that the by-law becomes all important, inasmuch as the power to do the work is derived from it, and it cannot be referred to, as is sometimes done, as a mere matter of form.

The same point was urged in *Croft v. Town of Peterborough*, 5 C. P. 35, and the late Chief Justice Macaulay admitted, that it might at first sight appear that there was force in the argument that, when treated as wrongdoers in a civil action by reason of something done to a highway which a by-law might have authorized and directed to be done, and which being done, was a public improvement and not a public nuisance, the want of a by-law would not make them wrongdoers in having done informally what might by the observance of due form have been done lawfully, but he proceeds to point out the fallacy of the argument, and it may be placed in a nut shell. If the municipality had the power under the statute to do the act, the want of a by-law ought not and would not affect their liability; but if they had no express power granted to them by the Act, but derived their power under the by-law, then in the absence of a by-law, they would, like any individual who had committed similar acts in the improvement of the highway to the detriment of an abutter upon it, be liable as wrongdoers.

The views of that very able Judge, Chief Justice Macaulay, were shared by Chief Justice Richards, who, after referring to this section authorizing the municipality to pass by-laws for the purpose of making such changes and improvements in the highway as I have referred to, concurs.

Judgment.

BURTON
J. A.

It is necessary, therefore, to consider the effect of the words just quoted. Do they give the corporation power to do *the acts pointed out*, or do they confer on the corporation the authority to make *by-laws* to authorize those acts *to be done*? I think the latter is the proper interpretation to give to the words.

In the first place, it is their literal meaning; in the next, it harmonizes with the general principles of law with regard to acts to be done by such corporations—viz., that the corporation should authorize them to be done by a by-law of the governing body.

If the part of the section referred to were only directory, it would imply that the municipality had the inherent right to do the acts, and that the making of the by-law was only a means of declaring the will of the governing body of the corporation as to how the work should be done.

That has always, in my opinion, been the view taken by the Courts of the powers of municipal bodies from *Reid v. The City of Hamilton*, 5 C. P. 269, and *Croft v. Town of Peterborough*, 5 C. P. 35, downwards.

It is true these cases were decided before the amendment giving compensation, but that cannot affect the question; if before the change a by-law was passed, it made the act legal, and deprived the party injured of any remedy; if done without a by-law, the party injured had his remedy by action, and that law has never been changed.

It no doubt worked sometimes oppressively when an injury could be thus done without compensation. The law is now placed upon a juster and more equitable footing; but the necessity exists now, as it always did, of obtaining legislative authority to do the act. And this protecting of the corporation as well as of private rights

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J.A.

seems to require, as observed by the late Chief Justice Macaulay in a very early case, a strict adherence to the requirements of the law; that by-law, until quashed, shields them from any action, and even if quashed, they alone, and not the persons who actually did the work, remain liable.

In this view, it would not be "remitting the plaintiffs to a right of action," but the corporation, having undertaken to do a work without legislative authority, are wrongdoers, and so liable in this action.

I differ only from the learned Chancellor in this, that he treats the act of the defendants as one which was obligatory upon them in the discharge of a statutory duty. If I could agree with him in that view of the facts, there would be no difficulty in arriving at the same result, so far as holding that the action is not maintainable.

It is only on the assumption that the act is authorized that the compensation clauses come into play—being done under the authority of a by-law the party suffering injury is deprived of his action, and until the recent changes, of all remedy whatever, and since those changes is confined to his remedy by arbitration—and the view which I now express is, I feel convinced, that which has been generally entertained and acted upon by the municipal bodies throughout the Province, and regarded as the proper construction of the Act by the profession, and it brings the arbitration clauses into harmony with the rest of the Act.

I do not think that the decision in *Adams v. The City of Toronto*, 12 O. R. 243, at all conflicts with, but confirms, the view I have expressed in this case. The judgment proceeds upon the ground that what was done by the city was in the due exercise of its powers, which pre-supposes that the council had adopted the necessary steps to enable it to do it. The statement of claim contains no allegation that the city were doing it without a by-law, and on that state of facts compensation was the only remedy.

I wish to add one remark in reference to the case of *Yeomans v. County of Wellington*, 4 A. R. 301, to which

decision I was a party, and to say that I do not agree with all the remarks attributed in that case to the learned Chief Justice, if they are to be taken literally. No question of the kind now before us was presented for our decision or in any way discussed. The parties there had voluntarily submitted to a reference. If they had even given the question of the necessity of a by-law a thought, it had not been insisted on, but both parties voluntarily submitted the claim as a claim for compensation under the Act.

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BURTON
J. A.

The point which was argued before us was the construction of the words "injuriously affected," it being contended that unless there was an actual injury to the land itself compensation could not be claimed, but the cases commented upon by the learned Chief Justice went to show that a much more liberal view had been taken in more recent decisions than was at first given to those words, and I feel convinced that it was in that view only that he cited them.

If the lands in that case were injuriously affected, the plaintiff had an undoubted right to waive his action against the corporation as wrongdoers, and to agree with them to leave his claim as one for compensation under the statute, and such an award would stand if his land was injuriously affected, and that was all that was decided in that case. If the dicta relied upon could be regarded as sanctioning the view that the municipality of its own authority, and without any legislative action of the council as a body, could under our Act raise the level of the highway, as in that case, I can only say that I never intended to join in such a conclusion, but expressly dissent from it. I think it will be found also that Mr. Justice Gwynne intended to deal only with the question of the meaning of the words "injuriously affected," for he says "the sole question therefore which remains is, is the real property of the claimant in the case before me injuriously affected within the meaning of the decided cases," and that is the only point he discusses, not whether the claimant could have compelled an arbitration. Nor do I see anything in my remarks in *Mc-*

Judgment.

BURTON
J.A.

Garvey v. Town of Strathroy, 10 A. R. 631 at p. 636, to which the learned Chancellor has referred, at all at variance with the views that I have now given expression to; the concluding portion of my judgment refers plainly to cases "where the powers exercised by the corporation are imposed upon them by law, or are within their statutable authority, and they construct the works with reasonable skill and care."

Here the duty was not one imposed upon them by law, and although the council had power to pass an act which would have enabled the municipality to do the work, they neglected to do so, and have left them exposed to an action for consequential injuries which, for want of a by-law, they are unable to justify.

I am of opinion therefore that the appeal should be allowed.

Appeal dismissed with costs, BURTON, J.A., dissenting.

JONES V. THE GRAND TRUNK RAILWAY COMPANY.

Negligence—Railways—Carelessness contributing to accident—Approach to Station.

To reach from the highway, the station of the defendants at Point Edward, it is necessary to go through the railway yard and cross eleven railway tracks. A plank-walk, unfenced and unguarded, runs across these tracks, extending from the street to the east end of the station platform. The husband of the plaintiff, who was familiar with the locality, while hurrying to the station before daylight, left this plank-walk upon reaching the track nearest the platform in order to walk round the rear of a train that was coming in from the east on that track and was still in motion. While some twenty feet from the plank-walk, walking between the tracks and near the rails of the track second from the platform, he was struck by the buffer beam of a shunting engine and killed. This shunting engine had been standing some 150 feet to the west of the plank-walk, and was passing slowly to the east for the purpose of being switched on to the track nearest the platform, and then aiding in placing in the ferry boat the cars of the train that had just come in. The shunting engine had been standing to the west of the plank-walk for the purpose of convenience in giving orders to the engineer; its head-light was burning and as it moved its bell was ringing. There was ample space between the two tracks for a person to stand in safety, and the approach of the shunting engine could easily be noticed.

Held, (HAGARTY, C. J. O., dissenting,) reversing the decision of the Chancery Division, that the accident was due to the carelessness of the deceased and not to the negligence of the defendants, and that the plaintiff could not recover.

The extent of the duty of railway companies in providing safe access to their stations considered.

THIS was an appeal by the defendants from the judgment of the Divisional Court, Chancery Division, pronounced on the 16th day of June, 1887, dismissing with costs a motion on behalf of the defendants to set aside the verdict and judgment for the plaintiff entered at the trial of the action. Statement.

The action was brought by the plaintiff, as executrix of her husband Thomas J. Jones, to recover from the defendants damages sustained by the plaintiff by reason of the death of her husband, who was killed by a shunting engine of the defendants at Point Edward.

It appeared that the only means of access to the defendants' station at Point Edward from the highway was by passing through their station yard and grounds across eleven tracks. A plank-walk and drive way extended from

Statement. the street across these tracks to the east end of the passenger platform, but it was not in any way fenced off or separated from the rest of the company's grounds.

Jones resided at Fort Gratiot and was familiar with the nature of the approach to the Point Edward station.

On the morning of the 29th January, 1887, Jones who had been visiting his sister at Point Edward, left her house shortly after six o'clock, intending to return home by the early train from the east, due at 6.15 a.m. This train usually stopped at Point Edward twenty minutes. On the morning in question it was fifteen minutes late, but Jones was late in leaving his sister's house and was in danger, as he thought, of missing the train, and was hastening to the station. As he approached the station the train was just coming in on the track which was nearest to the platform and it was then passing over the plank-walk, obstructing for the time further passage to the platform. This was before daylight and the approach to the station was imperfectly lighted by coal-oil lamps.

Very often trains stopping at the station over-lapped the plank-walk and instances were proved of persons having left the plank-walk to walk round the obstructing cars.

Jones, who was then on the plank-walk, spoke to one McMillan, a car-repairer in the company's service, who was standing near the rail of the second track, and asked where the moving train was from. He was told it was from Toronto. McMillan then turned away, and when he next noticed Jones, a moment or two later, he saw that he was going in an easterly direction, walking between track No. 1 and track No. 2, for the purpose, as he supposed, of going round the rear of the train to the platform. Jones had already gone twenty feet from the east side of the plank-walk when he was overtaken and knocked down by the projecting buffer beam of a shunting engine which came up behind him on track No. 2. He was walking close to the end of the ties of this track, probably for the purpose of keeping as far away as possible from the moving train

on his other side. At the plank-walk there was a space of about ten feet between the two tracks and this space increased slightly to the east of the plank-walk. Statement.

The shunting engine in question was standing, when Jones came up to McMillan, some distance, perhaps 150 feet, west of the plank-walk, on track No. 2, and it started to go up that track to the east for the purpose of switching on to track No. 1, some 400 feet beyond the plank-walk, and then backing up behind the incoming train to assist in the work of transferring the cars to the ferry-boat. It was stationed at the point it started from for the sake of convenience in giving orders to the engineer, and was going at the rate of two or three miles an hour. The buffer beam of the engine was some four inches longer on each side than the buffer beams of ordinary engines and the tank of the engine was in some respects peculiarly constructed, and interfered, it was contended, with the engine-driver's view of the track. The morning was dark, but the engine had the usual headlight in front, and also a light in the rear. The bell was ringing from the time it started until it passed McMillan on the crossing, and there was no evidence that it had ceased ringing up to the moment of the accident. The incoming train had not then stopped, and the bell of its engine was also ringing.

The action was tried before Galt J., and a jury, at the Spring Assizes at London, on the 7th day of May, 1887. The following were the questions submitted to the jury and the answers of the jury thereto:

1. Were the defendants guilty of negligence in the manner in which the shunting engine was moved? A. Yes.

2. Was the deceased guilty of negligence in leaving the plank-walk and walking between the rails in order to get round the end of the cars? A. No.

3. What amount of damage is the plaintiff entitled to recover if the defendants are liable? A. \$2,000, independent of what she has received otherwise.

Statement.

Upon these answers the learned Judge entered judgment for the plaintiff for \$2,000, with full costs of suit.

A motion was made on behalf of the defendants against the verdict and judgment before the Divisional Court, Chancery Division (Boyd C., Ferguson and Robertson, JJ.) and was argued on the 16th day of June, 1887. Judgment was delivered at the conclusion of the argument holding that there was evidence of negligence to go to the jury, and that the verdict was reasonable and warranted by the evidence, and the motion was dismissed, with costs.

From this judgment the defendants appealed, and the appeal came on to be heard before this Court (HAGARTY C. J. O., BURTON, OSLER and MACLENNAN JJ.A.) on the 20th November, 1888.

McCarthy Q. C. and *W. Nesbitt* for the appellants. There was no evidence given on the part of the plaintiffs of negligence on the part of the defendants causing the accident in question in this case, but on the contrary, the deceased came to his death by his own negligence, involuntarily putting himself in a place of danger. The deceased being a trespasser, the degree of care cast upon the defendants in regard to his safety differed from the degree with which they would be chargeable had the accident taken place on the plank-walk, and the defendants would be liable only in case of gross negligence on their part, which was not shown.

W. R. Meredith Q.C. and *R. M. Meredith* for the respondent. The way in question being the only means of access to the station, and the defendants having placed a network of tracks across such way on a level therewith, and workshops and other buildings near thereto, and being in the habit of frequently moving their trains of cars across such way, and having invited the public to cross and use such way, it was their duty to exercise more than ordinary caution: *Smith* on Negligence, ch. 3, sec. 2, title, "Invitation"; *Denny v. Montreal Telegraph Co.*, 42 U. C. R. 577; *Girdwood v. North British R. W. Co.*, 4 Court Sess. Cas. 4th series 115; *Bilbee v. London Brighton and*

South Coast R. W. Co., 18 C. B. N. S. 584. The defendants were guilty of negligence in unnecessarily having the engine in question standing to the west instead of to the east of the plank-walk, and in putting the engine in motion and bringing it across the plank-walk while the train from the east was coming in and was still in motion; in not sufficiently lighting the plank-walk, or providing watchmen for the safety of persons crossing, or gates or guards; in using in such a place an engine with extraordinary length of buffer beam over-lapping the tracks on either side; in not constructing the plank-walk or the station so that persons coming to and from the station would not be obliged to cross the numerous tracks in question: *Dublin Wicklow and Wexford R. W. Co. v. Slattery*, 3 App. Cas. 1155; *Renaud v. Great Western R. W. Co.*, 12 U. C. R. 408; *Hart v. Chicago Rock Island and Pacific R. W. Co.*, 41 Am. R. 93; *North-Eastern R. W. Co. v. Wanless*, L. R. 7 H. L. 12; *Beckett v. Grand Trunk R. W. Co.*, 8 O. R. 601, 13 A. R. 174; *Nicholson v. Lancashire and Yorkshire R. W. Co.*, 3 H. & C. 534; *Rogers v. Rhymney R. W. Co.*, 26 L. T. N. S. 879; *Martin v. Great Northern R. W. Co.*, 16 C. B. 179. The case was clearly one for the jury, and their verdict having the approval of the Judge at the trial and of all the Judges of the Divisional Court ought not to be disturbed by this Court: *Metropolitan R. W. Co. v. Wright*, 11 App. Cas. 152; *Rose v. North Eastern R. W. Co.*, 2 Ex. D. 248; *Robson v. North Eastern R. W. Co.*, 2 Q. B. D. 85; *Connecticut Mutual Life Insurance Co. v. Moore*, 6 App. Cas. 644 at p. 656. The deceased was not a trespasser as the defendants' own negligence compelled him to turn off the plank-walk. There was no contributory negligence on the part of the deceased, and even if there had been contributory negligence, yet the defendants are liable, for the engine in question should have been stopped in time to prevent the accident: *Radley v. London and North-Western R. W. Co.*, 1 App. Cas. 754.

McCarthy, in reply.

Judgment. December 22nd, 1888. BURTON J.A. :—

BURTON
J.A.

Of the five specific acts of negligence charged in the statement of claim, none were sustained in evidence as causing the injury, and most of them were distinctly disproved, and the question ultimately left to the jury was confined to whether there was negligence on the part of the company in the manner in which the shunting engine was moved.

There is no dispute about the facts. (After stating the facts the learned Judge continued): Upon these facts I fail to discover any violation by the company of any duty which they owed to the deceased, or to the travelling public of which he was one, and without such breach of duty there can be no such thing as actionable negligence.

There is nothing illegal in having such an approach as this to their platform. I quite agree that they are called upon to use increased care and vigilance in the movement of their trains, but the fact that it is in use for the purposes of the railway requires increased vigilance also on the part of the public using it, in the same way as a foot passenger crossing a street in a large and crowded city is bound to vigilance.

It is shewn that the shunting engine was moving very slowly, and had complied with the statutory requirements.

A good deal was said as to the buffer beam being larger than some people who were examined had noticed upon other engines, and that it encroached some four inches farther upon the space between the tracks than ordinary passenger engines; and it was also urged that the tank was on the top, and somewhat interfered with the engine driver and fireman seeing what was in front of them.

It can scarcely be urged that the fact, if it be a fact, that the buffer beam occupied four inches more of the ten feet than ordinary engines, in itself furnished sufficient evidence of want of skill or care in the construction of the engine. After deducting the four inches, there was ample space for the deceased to stand in safety; nor is it

shewn by evidence that such a tank as was used was not proper to be used.

Judgment.

BURTON
J.A.

The Railway Act prescribes the ringing of the bell or the sounding of the whistle, as a signal or warning when a locomotive is approaching a crossing or a highway, but does not require in addition that a constant look out should be kept from the engine, and if the tank had been absent, the attention of the driver would be directed to the rails in front of him, and not to persons on the ten foot way. No such duty is directed or indicated by the Act of Parliament, and is not shown to be reasonably called for.

I have, perhaps, entered more largely into this question than is warranted by the verdict, no attempt having been made at the trial to elicit any finding on these questions; the jury having merely found that the negligence consisted in the manner in which the shunting engine was moved, and there is not a particle of evidence, in my opinion, to show negligence in that respect. It was moving slowly, and every precaution was taken which the law requires to warn passengers of its approach.

But even if a wider meaning is to be given to the finding, and we are warranted in supposing that the jury founded their verdict upon any supposed breach of duty on the part of the company in having the tank in a position different from that upon an ordinary engine, I would say in the words of Sir George Jessel, in *Richardson v. The Great Eastern R. W. Co.*, 1 C. P. D. 342.

“It is not for the jury to lay down an absolute duty such as this irrespective of the case and the evidence laid before them. It is impossible to make that answer a foundation for a verdict against the defendants.”

I am not at all prepared to accede to the view that there was any evidence to warrant the suggestion that there was an implied invitation on the part of the company to any one to leave the plank-walk and pass in rear of the train, but even so it does not carry the case any further; it is still an invitation or permission to cross the tracks of a railway in full operation. There is no undertaking or repre-

Judgment.

BURTON
J.A.

sentation that the working of the road shall not take its ordinary course. But my objection goes much further; assuming for the sake of argument that it was an invitation to cross in rear of the car, it differs altogether from the cases which have been referred to.

The permission at most was to cross the track nearest the platform. If the accident had occurred upon that track by reason of the train backing I should think it not dissimilar to the case cited from 26 L. T. N. S. Here the accident occurred from the deceased being too near the second track in a place where he had no right to be.

In *Foy v. London Brighton and South Coast R. W. Co.*, 18 C. B. N. S. 225, there was an express direction from one of the company's servants to alight in the dangerous place, and in *Nicholson v. Lancashire and Yorkshire R. W. Co.*, 3 H. & C. 534, although the level crossing over which the passengers should have passed from the train to the place of egress from the station was blocked by the train, the ticket collector ordered them nevertheless to "go on." That was under the circumstances an order to pass round the train, and the plaintiff was injured by falling over an obstacle negligently left by the defendants in the way thus indicated.

There was ample space both on the plank-walk, and even a greater space where the accident occurred, to make the deceased perfectly safe if he had taken any reasonable care.

So far as the company are concerned it appears to me to be purely an accident, and I think that it sufficiently appeared upon the plaintiff's own case that the accident was attributable not to any negligence or want of care or skill on the part of the defendants, but to the deceased's own want of care, and I think that possibly on that ground the plaintiff should fail, but certainly on the ground that no breach of duty on the part of the defendants has been proved.

I think the appeal should be allowed, and the action dismissed, with costs.

OSLER J.A. (after stating the facts, continued):—

Judgment.

OSLER
J.A.

On behalf of the plaintiff, it was contended that there was an invitation or permission by the company to the deceased and others to leave the plank-walk and seek some other means of access over their grounds to the platform because passenger trains frequently drew up across the walk, and necessarily did so, (as the train in question finally did) when made up, as it was, of more than five cars. The rear car in this instance overlapped the walk about thirty feet. Then it was said that there being this invitation or permission of the company to deviate from the provided and usual way, there was negligence (1) on the part of the men in charge of the engine in not keeping a proper look out: (2) in using an engine with a buffer projecting so much over the space between the tracks: (3) in stationing the engine west instead of east of the crossing, thereby making it necessary to traverse the crossing in going to switch on to track No. 1; and (4), to summarize all other objections, that there was negligence in not using more than ordinary care and caution to prevent accidents at a place which was unusually dangerous.

The first question then is, whether it can be reasonably inferred that there was anything equivalent to what is termed an invitation by the railway company to the deceased and others to be on their premises elsewhere than at the plank-walk, while further progress over it was being obstructed by a train actually passing or moving across it. Conceding that the public were invited to reach the station platform by passing across the company's premises at any place where they could find a convenient way when the regular crossing was interrupted by a stationary train, did that justify anyone in leaving the way before it became actually necessary to do so by the stoppage of the train upon it? These questions should, I think, be answered in the negative. The public take the passage as it is provided with the knowledge that it must be obstructed by the

Judgment.

OSLER
J.A.

trains crossing it from time to time. They are not invited to use it, or to pass to the station platform, while a train is moving over it, and the evidence is that after its arrival, there is a delay of twenty minutes, giving ample time to any one who has arrived at the ground to get round the end of the train to the platform if the crossing happens to be obstructed in fact. Had the plaintiff waited until the train had come to a standstill, he would have been in comparative safety, as he could have gone close alongside of it free from any possible danger from any engine or train moving on the other side.

Then what act of negligence were the defendants guilty of? The engine was being propelled slowly. There was the usual head-light, and the bell was ringing, and there being no reason to suppose that any one would be walking upon the track, or so close to it as to be in danger, there was no duty on their part to keep a look-out for such persons.

I cannot agree that there was negligence in the construction of the engine, either as regards the width of the buffer beam, or the position of the tank, looking at the place and manner in which it was being used, and the purpose for which the engine was built.

The case, however, appears to me to be one in which it must be said that the deceased's own negligence was the cause of his death. He was about to go into a place of danger, and to walk either directly upon a track or on a place where he might find himself between two moving trains, and if he had looked before leaving the crossing, he must have seen the approaching engine. If, as the evidence shews, he was struck at the distance of twenty feet from the crossing, or even as another witness for the plaintiff says, at thirty or thirty-five feet, the engine on the other side of the crossing going at the rate of two or three miles an hour, must, when the deceased left the plank walk, have been fully within sight and hearing of any one who had looked to see if an engine or train was approaching. Perhaps some idea of its proximity to the

crossing may be formed from the fact of the deceased not having been seen by the man on the engine. No doubt the accident happened before daylight; but what reason can be suggested for thinking that the deceased could not have seen and heard the engine if he had looked up the line. I think the case is one to which the language of Bowen L. J., in *Davey v. London and South Western R. W. Co.*, 12 Q. B. D. 70, may be applied: The deceased, before leaving the crossing, "had he been a sensible man, would have looked up and down the line to see if there was a train coming either way. A train was in fact so close to him that he was only able to cross fifteen feet (in our case twenty or thirty feet) before he found himself between its buffers. Now, is it open to any reasonable man to draw the inference that the accident was caused by anything except the gross negligence of the man who never looked at a train (or engine) which was within a few feet of him."

Judgment.

OSLER
J.A.

I refer also to *Commissioner for Railways v. Brown*. 13 App. Cas. 133; *Dublin Wicklow and Wexford R. W. Co. v. Slattery*, 3 App. Cas. 1155 at p. 1166.

I think, with great respect, that the appeal should be allowed.

MACLENNAN J.A. :—

In cases of this sort when the facts are admitted or not disputed, it is the function of the Judge to say whether an inference of negligence can properly be drawn from them, and it is the function of the jury to say whether they will or will not draw that inference. Per Lord Blackburn, *Dublin Wicklow and Wexford R. W. Co. v. Slattery*, 3 App. Cas. 1155.

In this case there was no controversy about the facts. The jury did draw the inference, and the sole question in this appeal is, whether the inference could properly be drawn.

The onus of proof lay upon the plaintiff, and she had to

Judgment. make out that the accident was caused by a negligent act
MACLENNAN of the defendants, and that her husband was not guilty of
J.A. any negligence which contributed to the accident, or if he
was, that the defendants could by reasonable care have
avoided injuring him : *Davey v. London and South Western*
R. W. Co., 11 Q. B. D. 213 ; 12 Q. B. D. 70 ; *Metropo-*
litan R. W. Co. v. Jackson, 3 App. Cas. 193.

Now, if the deceased had been standing on the plank-walk, where he had a right to be, instead of twenty feet at least beyond it, where he had no right to be, at all events not until after the passenger train had stopped, I could understand that it might have been the duty of the engineer or fireman to see him there, and to endeavour to stop the engine, but I am unable to see how as a matter of law it can be negligence not to have seen him where he was standing.

I have given my most earnest attention to the case, and I am unable to see anything upon the undisputed facts of the case from which the jury could properly have drawn the inference of negligence by the defendants contributing to the accident : *Simkin v. London and North Western R. W. Co.*, 21 Q. B. D. 453. I think, moreover, that the deceased suffered from his own great carelessness. There was plenty of room where he stood, a single step would have saved him. The head light was shining, the bell was ringing, and the engine was moving between two and three miles an hour, a moderate walking pace for a man, and I do not see any proof that the defendants could with reasonable care have avoided the accident, which the unfortunate man thus brought upon himself. It is mere matter of conjecture whether if the engine had been differently constructed the engineer would or would not have seen him in time to have saved him : *Neill v. Travellers Insurance Co.*, 7 A. R. 570, at p. 574 ; 12 S. C. R. 55 ; *Avery v. Bowden*, 6 E. & B. 953.

I think the appeal should be allowed, and that judgment should be entered for the defendants.

HAGARTY C. J. O.:—

Judgment.

HAGARTY
C.J.O.

It would have been better that the jury should have been asked to find specifically that, according to the evidence, the company had allowed persons to go round the end of an overlapping train to reach their station, that is, that they had never interfered with passengers so doing. *Nicholson v. Lancashire and Yorkshire R. W. Co.*, 3 H. & C. 534, is instructive on this point: *Rogers v. Rhymney R. W. Co.*, 26 L. T. N. S. 879.

The overlapping by this train was of frequent occurrence, and would generally continue some twenty minutes. In going round the rear car, the deceased only did what most persons would have done under the same circumstances at risk of being too late.

The case is not without some evidence of negligence as to the shunting engine, and I agree that the Judge was right in refusing to withdraw it from the jury.

It was proved that it is difficult to see objects from this engine, unless they are say fifty or sixty feet away, from the height of the water tank. Two witnesses speak as to this, and the defendants' engineer in charge of the engine did not see the deceased until he saw him under the wheels of the shunter; and his so seeing him was in consequence of a man holloaing to him to stop, there was a man under the engine.

It was certainly proper to submit this to the jury, as it was submitted by the learned Judge, and the jury found there was negligence in the management of that engine.

I agree with the learned Judges of the Chancery Division, that the verdict should not be disturbed.

The railway company invite passengers to this station and platform by one only approach—a road or path crossed by eleven of their tracks.

They block this path by a train. I am unable to see the force of their argument, that if the intending passenger had waited on this path and probably thereby lost his passage, he would not have been injured.

Judgment.

HAGARTY
C.J.O.

We must look at his position, tracks behind and before him, and anxious not to miss his train. Must not a railway company fully understand that in the nature of things, in the daily course of business, the vast majority of persons would try to get round an overlapping train ?

It is wholly their own doing that they compel intending passengers to use, as their only approach, a path through and over eleven tracks.

That this was a dangerous approach is, I think, properly deducible from the evidence. The witnesses were clear on that point, though on some ground, which I do not understand, it was several times objected that they should not be allowed to say so.

When, therefore, such an approach is thought sufficient by the company, and they invite people to use it as the only access, I reserve for future enquiry, whether a person using such a way, as it is ordinarily used, must always, if injured by an engine of the company passing across it, be able to lay his finger on some specific act of negligence in the management of that engine, beyond the fact that he was run down and hurt by it, without any positive fault or omission of his own.

As was said by Bramwell B., in *Rogers v. Rhymney R. W. Co.*, 26 L. T. N. S. 879: "The defendants allowed this crossing to be used as a convenience for their passengers; and, if so, they must be taken to have held out to their passengers that they might use it with safety."

I think it could be argued with much force that what they hold out is "cross there and we won't run over you," not merely that they will not be guilty of any specific negligence in the management of the engine which in fact does run over the passenger.

It is not necessary in this case to decide more than the evidence calls for, but I desire to guard myself from deciding unnecessarily here that it was essential to the right to recover to prove specific negligence in the management of the shunting engine, beyond that it did run over and injure the passenger.

A number of matters were for consideration here. The peculiar nature of this approach, its danger, the alleged insufficient lighting and absence of guards for the protection of the public.

Judgment.

HAGARTY
C.J.O.

I refer to the language of Erle C. J., Byles, Keating and Montague Smith, JJ., on this head, viz: taking everything into account, the circumstances called for more vigilance and care than the company seem to have exercised.

As to the suggestion of the deceased having voluntarily placed himself in danger, we may refer to a late case, *Osborne v. London and North Western R. W. Co.*, 21 Q. B. D. 220.

It is not necessary to assert here that the law imposes a liability on companies, as it were, to warrant and insure persons whom they compel at night to approach their station over a net work of tracks against all casualties, but under all the circumstances in evidence I think it should be held that there was a case proper to be submitted to the jury and enough proved to warrant their finding for the plaintiff.

Appeal allowed with costs, HAGARTY C. J. O. dissenting.

THE CORPORATION OF THE TOWNSHIP OF NOTTAWASAGA V.
THE HAMILTON AND NORTH WESTERN RAILWAY COMPANY.

Railways—Agreement to erect and establish stations—Admissibility of oral representations to vary written agreement—Res adjudicata.

By agreement bearing date the 19th day of May, 1873, the defendants in consideration of a bonus of \$300,000 granted to them by a section of the county of Simcoe, of which the township of Nottawasaga forms a part, covenanted with the plaintiffs to (among other things) "erect, build, and complete good and sufficient and suitable station buildings for passengers and freight" at five certain places within the township; to "establish at each of the places hereinbefore mentioned regular way stations," and to "well and sufficiently keep and maintain the said five stations above mentioned with all such suitable, necessary, and proper buildings as the business done or capable of being done at the said stations respectively may require for seven years after the trains shall have commenced to run on the said road and (to) undertake to do the passenger and freight business of the county at said stations."

By a further agreement bearing date the 25th day of May, 1878, the defendants in consideration of a bonus of \$20,000 granted to them by the plaintiffs, covenanted with the plaintiffs to "erect, build, and complete good and sufficient and suitable station buildings for passengers and freight on the line of the said railway at the several places following in the said township," five places being specified, and to "establish at each of such places regular way stations." This agreement provided that the route of the line of the railway through the township as defined in the former agreement might be deviated from to such an extent as to admit of the stations being located at the points mentioned in the second agreement, and provided further that it should not be incumbent on the defendants to erect stations at the places mentioned in the former agreement, "but that the places herein defined for stations shall be taken to be in substitution for the places mentioned in such former agreement."

The defendants erected stations at the points specified, three of these stations being respectively called A., G., and N. Trains commenced to run on the line in the year 1879.

In 1880 the plaintiffs being dissatisfied with the mode in which the stations at G. and N. were being maintained brought an action against the defendants for specific performance of the agreements. In this action a consent decree was pronounced and an injunction granted restraining the defendants from ceasing to maintain the stations except in a certain manner in the decree specified. The decree contained no limitation or other provision as to the time during which the stations were to be maintained, though this question had been raised at the hearing of the action.

In 1886, after the expiration of the seven years, the defendants made changes in their mode of maintaining the station at A. and kept it open for about four hours a day only. The plaintiffs were dissatisfied and this action was thereupon brought by them to compel specific performance of the agreements.

Held, reversing the judgment of ROBERTSON, J., that the word "establish," does not in itself mean "maintain and use for ever;" that the seven years limitation applied to the substituted stations, and that the defendants were not bound to maintain them after the expiration of that time.

Bickford v. The Town of Chatham, 14 A. R. 32, and in the Supreme Court, (not reported), *Jessup v. Grand Trunk R. W. Co.*, 7 A. R. 123, and *Geauyeau v. Great Western R. W. Co.*, 3 A. R. 412, considered; *Wallace v. Great Western R. W. Co.*, 3 A. R. 44, distinguished.

Held, also that the decree in the former action did not constitute the question of the seven years limitation *res adjudicata*; there being no adjudication on that question, and in any event an adjudication on that question being unnecessary at the date of the former action; *Concha v. Concha*, 11 App. Cas. 541, considered and followed.

At the trial evidence was admitted on behalf of the plaintiffs of representations made by directors of the defendant company, at meetings held to consider the question of granting the second bonus, to the effect that by the second agreement the defendants would be bound to maintain the stations for all time.

Held, that this evidence was clearly inadmissible.

THIS was an appeal by the defendants from the judgment of Robertson J., delivered on the 2nd day of March, 1888, whereby the plaintiffs were granted the relief prayed for in their statement of claim, with costs. Statement.

The action was brought by the plaintiffs against the defendants to compel the specific performance by the defendants of two agreements entered into by them in regard to maintaining the station at Avening on the defendants' line of railway.

By an agreement entered into on the 19th day of May, 1873, between the defendants and the plaintiffs, the defendants, in consideration of a bonus of \$300,000 which it was proposed that a portion of the County of Simcoe, of which the Township of Nottawasaga forms a part, should give the defendants, among other things covenanted as follows:

Thirdly:—That they, the said company, their successors and assigns, shall and will erect, build and complete good and sufficient and suitable station buildings for passengers and freight on the line of said railway at the several places following, that is to say: First, at or as near to the said village of Avening as possible to the east of the road; secondly, At or as near to the said village of Creemore as possible; thirdly, at or as near as possible to the side line between said lots fifteen and sixteen in the seventh concesssion; fourthly, at or as near to the said village of Duntroon as possible; and fifthly, at or as near to the said village of Nottawa as possible, and shall and will establish at each of the places hereinbefore mentioned regular way stations; and

Fourthly:—That they, the said company, their successors and assigns, shall and will well and sufficiently keep and maintain the said five stations above mentioned with all such suitable, necessary, and proper buildings

Statement. as the business done or capable of being done at the said stations respectively may require for seven years after the trains shall have commenced to run on the said road, and shall and will undertake to do the passenger and freight business of the county at said stations.

By a further agreement made on the 25th day of May, 1878, between the defendants and the plaintiffs, in consideration of a further bonus of \$20,000 granted to the defendants by the plaintiffs in order to assist the defendants in the construction of a portion of the Collingwood section of their railway, the defendants, among other things, covenanted with the plaintiffs as follows :

The said company do hereby for themselves, their successors and assigns covenant, promise and agree to and with the said township, their successors and assigns, that in the event of the said by-law being ratified by the electors entitled to vote thereon, and being finally passed and taking effect, and the said bonus granted, the said company in the construction of that portion of the Collingwood section of the company's line extending from the point to which the same has been constructed at or near the village of Glencairn, to the town of Collingwood, shall and will erect, build and complete good and sufficient and suitable station buildings for passengers and freight, on the line of the said railway, at the several places following in the said township that is to say : First, on lots five and six in the second or third concessions ; Second, on lots eight or nine in the fourth, or lot nine in the fifth concession ; Third, at or near the side line between lots fifteen and sixteen in the seventh concession, and as far west as possible ; Fourth, on lot twenty-four or twenty-five in the eighth concession, and not further than three quarters of a mile from Hurontario street ; Fifth, within half a mile of the village of Nottawa, and either on the east or west side of Hurontario street ; and shall and will establish at each of such places regular way-stations.

The agreement also contained the following provisions for a change of the route of the line of the railway as defined in the first agreement :

IT IS HEREBY AGREED by and between the said company and the said township that the route of the line of the said railway through the said township as mentioned and defined in and by a certain agreement made between the said company and the said township bearing date the 19th of May, 1873, may be deviated from to such an extent as to admit of the stations on such portions of the line of the said railway being placed and located at the points hereinbefore mentioned, and it is admitted and agreed that such deviation has been found necessary and expedient from natural and engineering difficulties, and it is further agreed that it shall not be incumbent on the said company to erect stations at the places mentioned in

such former agreement, but that the places herein defined for stations shall be taken to be in substitution for the places mentioned in such former agreement. Statement.

By-laws were duly passed for carrying into effect the provisions of the agreements, and these by-laws were submitted to the electors and carried by their votes. The defendants received the bonuses, constructed in due course their line of railway, and erected stations at the places mentioned in the agreements; three of these stations being respectively called Avening, Glenhuron, and Nottawa. Trains commenced to run on the line of the railway in the month of July, 1879.

In the year 1880, the plaintiffs, being dissatisfied with the mode in which the stations at Glenhuron and Nottawa were being maintained by the defendants, filed a bill in the then Court of Chancery against the defendants, complaining of the non-compliance of the defendants with the terms of their agreements, and praying for specific performance of the agreements. The defendants alleged by way of answer that they had done, and were doing all that was required under the agreements.

That action came on for trial at the town of Barrie, on the first day of June, 1880, and a consent decree was arrived at, except as to the question of the time during which the stations in question were to be maintained. As to this question some discussion took place. The notes of the presiding Judge at the trial, are as follows:

NOTTAWASAGA v. H. AND N. W. R. W. Co.

Mr. Rye and Mr. Pepler for plaintiffs.

Mr. Boulton for defendants.

A consent decree has been come to except on one point.

Agreement:—19th May 1873, 25th May 1878.

Mr. Boulton.

By the 1st agreement:—Company will provide, keep, and maintain—seven years. 2nd agreement:—Wording is peculiar, merely an agreement; provide stations at certain places—but the limitation of seven years.

In the 1st agreement there are the words “keep and maintain.” This to be for all time if it were not qualified by the word seven years.

In the 2nd agreement the words are “erect, build, and complete and establish,” this does not necessitate the keeping them up. See *Goyeau v. Great Western R. W. Co., E. & A.*; *Wallace v. Great Western R. W. Co.*

Statement. I think the declaration should be that—declare that the defendants are bound to erect, build, complete and establish these stations under the agreements entered into between them and the plaintiffs, and order them to be kept in the decree. A declaration made and then a consent decree based on it.

The plaintiffs also put in in evidence (subject to objection) the endorsement on the brief of counsel for the plaintiffs at this trial. This endorsement is as follows :

“V. C. B.

1 June, 1880.

“Consent decree put in—on argument as to the limitation of seven years, the Court declines to insert any such limitation in decree.

“F. RYK.”

G. D. Boulton, contra.

The following decree was entered in the suit :

Tuesday, the 1st day of June, 1880.

This cause coming on to be heard this day at the sittings of this Court for the examination of witnesses and hearing at the town of Barrie in the presence of counsel for both parties upon opening of the matter and hearing read the pleadings and agreements in the plaintiffs' bill of complaint mentioned, and what was alleged by counsel aforesaid :

1. This Court doth declare that the defendants are bound to erect, build, complete and establish freight and passenger stations at Glenhuron and Nottawa on the Collingwood branch of their line of railway under their agreements with the plaintiffs in the bill of complaint mentioned, and doth order and decree the same accordingly.

2. And counsel aforesaid consenting thereto, this Court doth further declare that under the said agreements the defendants are bound to provide each of the said stations with proper means of ingress and egress, weigh-scales, and all necessary appliances and other accommodation, and to keep a proper and competent station agent at each of the said stations during working hours, and to sell tickets to and from each of the said stations for the two regular trains now running each way past the said stations and for all other trains with passenger cars attached now running or hereafter to run on the said branch line and which stop or shall stop at similar way stations ; and to receive and deliver freight and luggage at each of the said stations and for such purposes to stop at each of the said stations all freight trains now running or hereafter to run on the said branch line, and which stop or shall stop at similar way stations, whenever freight is required to be delivered at or shipped from said stations, and to keep each of the said stations lit and heated during working hours when necessary, and to stop the mail train at both stations each way at times to be fixed in the defendants' regular time tables, and further to stop by their said station agents at such stations all other of the aforesaid passenger trains whenever passengers, freight or luggage require to take the cars, alight, deliver or be shipped at said stations on or off said trains

(the time of passing whereof is to be fixed by the said time-tables), and generally to maintain the said stations and each of them in the same manner as other similar way stations on the said branch line and doth order and decree the same accordingly. Statement.

3. And this Court doth further order and decree that an injunction be awarded to the plaintiffs restraining the defendants from ceasing or refraining to keep and use the said stations or either of them in the manner set forth in the two preceding paragraphs of this decree.

4. And this Court doth further order and decree that the defendants do pay to the plaintiffs their costs of this suit forthwith after taxation thereof.

“GEO. S. HOLMESTED,”

Registrar.

Some time in the year 1886, after the expiration of seven years from the time when the trains commenced to run on the line of the railway, the defendants ceased to maintain the station at Avening in the manner in which up to that time they had maintained it. Up to that time the defendants had a permanent station agent at Avening; the station was kept open all day, and business transacted in the usual manner. In 1886, however, the defendants moved their station agent from Avening, and merely sent the agent from the adjoining station of Glencairn to Avening for some four hours each day. During the rest of the day the station was closed and no business could be transacted there, although trains stopped at the station, and passengers could get off and on at that point. The plaintiffs being dissatisfied with this mode of maintaining the station, brought this action. The defendants alleged that they were not bound to maintain the stations at all after the expiration of seven years from the time when trains commenced to run, and the plaintiffs alleged by way of reply that this question was constituted *res adjudicata* by the decree in the former suit.

The action came on for trial before Robertson J., at Toronto, on the 15th day of February and the 2nd day of March, 1888. The learned Judge admitted evidence of statements alleged to have been made by certain directors, and by the secretary of the defendants, at meetings held to consider the by-law granting to the defendants the second bonus of \$20,000, to the effect that the second agreement was

Statement. intended to bind the defendants to maintain the stations mentioned for all time instead of for the period of seven years only as provided in the first agreement.

At the conclusion of the case, the learned Judge delivered the following judgment :

After hearing all the evidence I can quite understand how this contract came to be entered into between the parties. The Hamilton and North-Western Railway Company, having become short of funds, required an additional bonus from the township of Nottawasaga.

Their railway had not been completed through that township, nor had it reached the intended terminus. They had already received from several other townships, and perhaps this as well—I don't exactly remember how that is—a large bonus for the purpose of establishing certain stations and maintaining them. It appears that at that time the people were disappointed at the construction put upon the first agreement, or rather, perhaps, the condition which was incorporated in it, that the company was only bound to keep these stations open for a term of seven years. So in order to induce the ratepayers of Nottawasaga to increase the bonus, they then made another application to their council, representing what they required, and stating what they would do if that bonus was granted to them. One of the things that they particularly suggested and agreed to, was that the stations were to be placed at particular spots mentioned at the time, and that they should be kept there for all time. This having been stated fully to the council, they as a council agreed that they would submit it to the people for ratification. That having been done, these gentlemen connected with the railway company appeared before the people, and in the interest of the railway company called meetings throughout the township, at which meetings they met the ratepayers for the purpose of explaining to them what the purport and object of this agreement was, into which they were willing to enter, if an additional bonus of twenty thousand dollars was granted to them by the township. Now to my mind there is no doubt whatever that these gentlemen represented that the contract should be that they should establish these different way stations, and maintain them for all time to come in such a manner as is generally understood by people to constitute a regular way station. The upshot of that was that the bonus was carried, and it is not suggested that it was not paid to the railway company. The buildings were put up, and the stations were opened ; and I think the best illustration of what is meant by a regular way station is given in the way the company discharged the service at this point—at Avening. They had four trains a day, two north and two south ; two in the morning and two in the evening, and they had their station master and ticket agent and the ordinary accommodation that satisfied the people, and came completely within the terms of the agreement as both parties seemed to understand it. I say both parties, because I do not believe this or any other railway company, under the circumstances in which this agreement was entered into, would do more than they felt themselves

bound to do. The consequence is that they did what they understood the agreement called for, and the stations were served in a way which satisfied the ratepayers. There was no complaint about it, and matters went on without any complaint until December, 1886, when a complete change took place, and the station was closed up except for four hours in a day. Well, it may be the fact—and I am inclined to think it is the fact—that the bargain the company had made with the township was a very hard one ; but I do not see why a railway company should be excused from the performance of a hard bargain any more than an individual, or any other company. They entered into this contract with the ratepayers, and it is clear to my mind that the ratepayers never would have granted a further bonus of twenty thousand dollars had they not agreed positively and without any question that this station was to be maintained for a number of years. I say that I think the way the company has served that station and kept it open shows they understood what they were to do. But that is not all : I think the evidence of Mr. Webster, their own witness, puts it beyond question as to what the meaning of a regular way station is. I think his definition of it is exactly within the meaning that was given to it by the company themselves by the way in which they carried out their contract up to 1886, and that since that time it cannot in fact be called a way station in the sense of the term or the words that they used to the people, and as both parties understood it. I think therefore that the plaintiffs have made out a case, and that the company should be required, as prayed for by the plaintiffs, to carry out that agreement in the terms prayed for and claimed by the plaintiffs, and I think they should pay the costs.

Statement.

From this judgment the defendants appealed, and the appeal came on to be heard before this Court (HAGARTY C. J. O., BURTON, OSLER and MACLENNAN JJ.A.) on the 27th and 28th days of November, 1888.

W. Cassels Q. C. and *R. S. Cassels* for the appellants. The stations mentioned in the second agreement are to be in substitution for the stations mentioned in the first agreement, and the limitation of seven years applies. If the second agreement governs this case then the word "establish" does not bind the defendants to maintain the stations : *Bickford v. Town of Chatham*, 14 A. R. 32, and in the Supreme Court of Canada : *Jessup v. Grand Trunk R. W. Co.*, 7 A. R. 128 ; *Geauyeau v. Great Western R. W. Co.*, 3 A. R. 412 ; *Mead v. Ballard*, 7 Wallace 290. The evidence of statements made by the directors is clearly inadmissible, and in any event the finding of the learned Judge as to the effect of these state-

Argument. ments is incorrect: *Wood's Railway Law*, p. 116 *et seq.*; *McNeely v. McWilliams*, 13 A. R. 324; *Schliehauf v. Canada Southern R. W. Co.*, 28 Gr. 236. The question of the seven years limitation is not *res adjudicata*, as that question was not in issue in the former suit, and no decision was in fact come to upon that point. Moreover at that time, the seven years not having elapsed, no decision of that question was necessary: *Concha v. Concha*, 11 App. Cas. 541. The decree was a mere compromise or consent decree and does not work an estoppel: *Jenkins v. Robertson*, L. R. 1 H. L. Sc. 70; *Duchess of Kingston's Case*, 2 Sm. L. C., 8th ed. 812 at p. 835. The endorsement on the brief of counsel in the former suit is not admissible in evidence, but even if it is it merely shews that it was not considered necessary to determine the question of the seven years limitation. The conduct of the parties is no guide to the construction of the agreements: *Platt on Leases*, vol I., p. 725.

McCarthy Q.C. and *Pepler* for the respondents. The limitation of seven years does not apply. If it is held that this limitation applies then there is no consideration whatever for the second agreement. The evidence of the officers of the defendant company is clearly admissible as shewing the history of the transaction and the manner and inducements in and by which it was made; and also because the defendants having placed a certain construction on the agreements for the purpose of obtaining the bonus are now estopped from denying the truth of such representations. The question of time limit is at any rate *res adjudicata*, and the defendants are estopped by the judgment in the former action between the same parties in reference to the construction of the same agreements. The effect of the decree is to grant a perpetual injunction. *Houston v. Marquis of Sligo*, 29 Ch. D. 448; *Buckland v. Johnson*, 15 C. B. 145; *Gillies v. How*, 19 Gr. 32; *Chambers v. Dollar*, 29 U. C. R. 599; *Alison's Case*, L. R. 9 Ch. 1; *Taylor v. Hortop*, 33 U. C. R. 462; *Boileau v. Rutlin*, 2 Ex. 665 and 681; *Stinson v. Branigan*, 10 U. C. R. 210;

Regina v. Hartington, 4 E. & B. 780 ; *Newington v. Levy*, L. R. 5 C. P. 607, 6 C. P. 180 ; *Jewsbury v. Mummery*, L. R. 8 C. P. 56 ; *Gibbs v. Cruikshank*, L. R. 8 C. P. 454 ; *Phosphate Sewage Company v. Molleson*, 4 App. Cas. 801 ; *Reed v. Jackson*, 1 East 355. The memorandum of counsel made in discharge of his duty is properly admissible in evidence : *Roscoe N. P.*, 15th ed. 57 ; *Taylor on Evidence*, 8th ed. 612. The defendants covenant to "establish" stations and "do" the business of the county. This necessarily means maintaining the stations. *Wallace v. Great Western R. W. Co.*, 3 A. R. 44.

W. Cassels in reply.

December 22nd, 1888. HAGARTY C. J. O.:—

I will first notice the replication of *res judicata*.

Concha v. Concha, 11 App. Cas. 541, is a clear exposition of the law as to *res judicata*. If it were necessary for the decision and judgment in the former suit to determine the question now in controversy, then the doctrine would apply. The Probate Judge had awarded probate to issue on a will duly executed by English law. He added in his decree that testator was a domiciled Englishman. The latter question was that raised in the second suit. It was held not to be *res judicata*, as it was not essential to the decree awarding probate of the will. I refer to the language of Lord Herschell and the other Lords on the question, also to the case on the same will *DeMora v. Concha*, 29 Ch. D. 268.

It is of course to be noticed that a large portion of the arguments and discussion in the case went to the point whether the awarding of probate was an adjudication *in rem*. This it was decidedly held not to be as to the domicil question, and it was held not to be binding *inter partes* because the executors did not properly represent the claimant to a large portion of the residuary estate ; see the judgment of Bowen, L. J., in the 29 Ch. D. suit.

It is pointed out both by him and by Lord Blackburn

Judgment.

HAGARTY
C.J.O.

in the Lords (p. 565) that without its amounting to anything *in rem* or being an estoppel in that sense you may be concluded by its being *res judicata* as between the same parties.

The difficulty in our case is that no such question as is here raised appears to have been litigated between the parties to the former suit, viz., the seven years' limitation. No reference whatever is made to it either in bill or defence.

The seven years began to run about 1879. The decree was in June, 1880, and was proper in its form without any reference to this point.

Both agreements are set out in the bill. The decree is drawn up on reading the pleadings and agreements, and declares defendants bound to erect, build, complete, and establish stations at Glenhuron and Nottawa, under their agreements, and awards an injunction restraining defendants from ceasing or refraining to keep and use the said stations, &c.

On the brief of one of the counsel was endorsed "consent decree put in, on a request as to limitation of seven years, the Court declines to insert any such limitation in decree."

A minute of the case as is said from the learned Vice-Chancellor's notes, is put in.

(The learned Judge read the notes and decree, and continued.)

This decree in no way rests upon any point as to limitation of time; at least six years of the seven had yet to run; the decree professes to be based on the two agreements, and I can find no controversy or question raised as to how this limit is to be regarded.

Giving the plaintiffs the full benefit of what is stated in the memorandum on the brief we find nothing to indicate that the Court was expressing any opinion on the question, but simply declined to insert any reference to the seven years.

I am strongly of opinion that the proper conclusion for us to draw is, that the learned Judge declined in any way

adjudicating on such a question in a consent decree, and on a point not argued, leaving it to be decided thereafter when it might become important. I think that would be the natural and proper course to have taken in such a case.

Judgment.

HAGARTY
C.J.O.

I should have been rather surprised if any Court had without argument, and without such a question appearing in the pleadings have unnecessarily taken upon itself to decide such a point.

I think the respondents fail as to this point. I may refer to *Moss v. Anglo-Egyptian Navigation Co.*, L. R. 1 Ch. 108, and such like cases. They are very numerous.

I cannot think that the awarding an injunction without any limit of time, necessarily involves the conclusion that it means for ever.

Whenever an injunction is obtained on the basis of a contract, it seems to me that its operation must be necessarily limited in duration to the time that the relation between the contracting parties and those claiming under them may exist.

Apart from this *res judicata* question, I think the decision of the case must depend wholly on the construction to be placed on the existing special contract between the parties.

We are unable to agree with the learned Judge in his view as to the admissibility of a large quantity of evidence offered by the plaintiffs as to speeches made at and prior to the voting on the by-law by persons alleged to be agents of the defendants, in which they stated that under the new agreement, depending on the result of the decision of the electors, the stations were to be maintained permanently, and not as under the then existing contract only for seven years.

We think the legal construction of the written contract must govern.

We can fully understand the case of parties resisting the performance of an agreement, sought to be enforced against them, by proof that their execution of it was obtained by false representations or fraudulent misstate-

Judgment.

HAGARTY
C.J.O.

ments of its effect to the plaintiffs or the agents through whom it was obtained. See such cases as *Corporation of Huron v. Armstrong*, 27 U. C. R. 533. And, again, we can understand after persons have executed a contract and discovered that they have been deceived and entrapped into its execution, their applying to the Court either for reformation or rescission.

The case before us is of a wholly different character. The bill sets forth two agreements, one in 1873, the other in 1878, and states an insufficient keeping of the station at Avening, as not being sufficient for public accommodation in the manner in which it is worked, and not in accordance with the defendants' contract on which they obtained large grants or "bonuses," in all \$40,000, from the township.

The defendants deny the insufficiency alleged, and state that their liability ceased at the expiration of seven years from the running of the trains, which term had expired. Reply as to this *res judicata*.

The claim is merely a contract set out, and a statement of its infringement. There is nothing claimed as to either rescission or reformation.

The arguments pressed on us were in substance that the defendants are bound, as to the meaning of the contract, by the speeches and statements of persons in defendants' interest in canvassing for votes, and to influence votes, for the by-law.

I can hardly conceive anything more dangerous or far reaching in its evil consequences, than to insist that in construing a written contract between parties, the Court is to be influenced, or rather guided, in its decision as to the legal meaning of the terms used, by electioneering speeches uttered ten years previously in canvassing for votes, or haranguing from hustings as to the adoption by the voters of any public contract or measure.

Few by-laws requiring the sanction of the ratepayers would stand a rigid application of any such system of construction.

In the Court below the case was not decided against the

defendants either on the *res judicata* defence, or on the actual legal import of the contracts, but rested very much on alleged speeches and representations.

Judgment.
HAGARTY
C.J.O.

We must examine the contracts.

(The learned Judge read the first agreement and continued.)

This agreement is plain and explicit, the obligation is limited to the seven years during which the stations are to be "well and sufficiently kept and maintained."

In the spring of 1878 the defendants applied for further aid from the township to enable them to extend the road from Glencairn to Collingwood.

The second agreement was dated 25th May, 1878; the voting was in June, 1878.

The road appears to have been opened about July, 1879.

Avening is between Glencairn and Collingwood, and the additional aid was required, as defendants urged, to get the line made from Glencairn to Collingwood, and Avening had not been a station till 1879.

(The learned Judge read the second agreement and continued.)

The first and only express reference to the first agreement is in this last paragraph, which declares that the route of the line as mentioned and defined therein may be deviated from so far as to admit placing the stations at the points mentioned in the preceding paragraph, as being necessary and expedient from natural and engineering difficulties, and the defendants are released from the obligation to place them at the points mentioned in the first agreement, and "the places herein defined for stations shall be taken to be in substitution for the places mentioned in such former agreement."

This agreement was made before the time named for the seven years to commence.

The only apparent change as to stations is as to locality; it seems to me that all other provisions and agreements as to such stations, apart from locality, would remain unaffected. The words used are identical in each as to

Judgment. "erect, build, and complete," &c., &c., down to the words
HAGARTY "regular way stations."
C.J.O.

It is quite true that the covenant as to erecting the stations need not necessarily have been inserted in the second agreement, a simple provision that the locality was to be changed would have sufficed. Then comes the provision that defendants need not erect the stations at the former point. That would be unnecessary, if an express change of locality had been alone mentioned. The new "places" are to be taken in substitution for the "places" in former agreement.

If there had been a special provision as to large extra accommodations at one or more of the first named stations, I think the township would hardly have considered that a change in its locality would release the company from providing the named accommodation.

If a man on leasing land had contracted to build a house and maintain it in good repair for seven years, and if after one year had expired, he made an agreement with his landlord to change the locality of the house to another point on the premises in place of the first named point, I do not think that would bind him to maintain it beyond the original limit of time.

If we hold the seven years limitation not to apply to the second agreement, the difficulty remains as to whether on its terms, the obligation is for all time.

Literally the agreement has been complied with; stations were erected, built, completed and established at the named points, and continued there for a number of years; and as to the station in question, it is still maintained, although in a state of reduced efficiency.

The plaintiffs sought to strengthen their position by reference to the words in the first agreement, "Keep and maintain." But this is followed by the express limitation as to the seven years, and must be subject thereto. Nothing about "maintaining," can, I think, be imported into the second agreement without such limitation. Then the case has to rest on "erect, build, complete and establish."

We have not to deal with an illusory performance of the contract, such as the mere erection, and non-user or immediate abandonment. The stations have been used for years.

Judgment.

HAGARTY
C.J.O.

I am of opinion that the words "erect, build, complete and establish" do not involve in themselves the continuance for ever, or as it were during the lifetime or existence of the undertaking as a running concern, and that a covenant so worded is in a case like the present complied with by the erection and completion and user in good faith thereof for a number of years, and that if it be sought to bind a company for perpetuity or a distinct term of year to such user, apt words should be used in the contract executed by both parties, and that in our construction we cannot import into it conditions not comprised in the words used. We have been favoured by the perusal of the judgment lately pronounced by Mr. Justice Strong, in *Bickford v. Town of Chatham*. His vigorous language on this point, as a question of construction, clearly shews the general rule to be observed—our view of the law in our judgment in that case. The views expressed by me, and also by Mr. Justice Patterson, were largely influenced by the language used in other parts of the contract from which we sought to clothe with larger meaning the bare words of the undertaking "to construct."

Lord Selborne's language, in *Wilson v. Southampton R. W. Co.*, L. R. 9 Ch. 279, may be applied to the present case with much force.

I especially notice his remarks as to the damages to be recoverable in an action for not performing the covenant in that case:

"That the company were expected to use it is very probable, but it is not so expressed, and the Court if it attempted to impose on the company anything like a definite obligation as to the use of the station, would not be executing the written agreement, but enlarging it."

The plaintiffs' counsel cited *Wallace v. Great Western R. W. Co.*, 3 A. R. 44, in this Court. But the covenant there

Judgment.

HAGARTY
C.J.O.

was "to erect and maintain a permanent freight and passenger station."

Jessup v. Grand Trunk R. W. Co., 7 A. R. 128, is not an authority of general application, turning on its special fact as to land granted in consideration of a station being placed on it. The words used included "keep and maintain."

In the same volume is reported *Geauyeau v. Great Western R. W. Co.*, 3 A. R. 412. The agreement stated was "to establish the Western terminus and depot" on plaintiffs' land.

Mr. Justice Patterson leaned strongly against the view that under the word "establish" there was the meaning "maintain and use for ever" (pp. 423-4). His language as to construction, is very applicable here.

Moss C. J. said he refrained from expressing any opinion on the meaning of the word "establish" as he rested his decision on other grounds.

I see nothing in this particular word to assist us in inferring a contract for any protracted user. It may, perhaps, assist the argument as against a mere illusory erection of a station, and that at least a station in full working order, in use, or ready for use, would be implied. There was a station set up and established here and used for years.

Unless we hold the word "establish" to mean permanent, co-existent with the existence of the railway, I see nothing in it to help plaintiffs. Short of giving it that extended meaning, it is useless on this point for decision.

It was asked what consideration did plaintiffs get for the second \$20,000. The answer may be that the road was stopped at Glencairn for want of funds, and that without this help they could not get the line through Avening and the other points to Collingwood.

On the whole the appeal should be allowed, and plaintiffs' bill dismissed.

OSLER J. A. :—

Judgment.

OSLER
J. A.

If the agreement of the 25th May, 1878, stands by itself, there is no limitation of the covenant to establish regular way stations, if that word is to be read as meaning to maintain permanently.

The company bind themselves not only to build, erect, and complete good and sufficient, and suitable station buildings for passengers and freight, but also to establish at each of the places specified regular way stations. In this respect the language is identical with that of the agreement of the 19th May, 1873. In the latter agreement, however, the word "establish" is evidently not used as equivalent to "permanently establish" or "fix or maintain permanently," but merely as descriptive of, or in connection with the character of the station, *i. e.*, regular way stations. The clause which follows shews that it was employed in a limited sense, providing as it does in unequivocal terms that the company shall and will well and sufficiently keep and maintain the said stations, with all such proper, suitable, and necessary buildings as the business done at the stations may require for seven years after the trains shall have commenced to run on the road, &c.

The object of the second agreement, which was made before the line had been opened or completed, was first and principally to change the sites of the stations as specified in the former agreement, and secondly to permit the company to deviate from the line of route therein defined, so as to admit of the stations being located at the new sites.

The first agreement is referred to for the purpose, as I think, of shewing that it is not varied or abandoned except in these particulars, thus: (1) The route of the line defined in the former agreement may be deviated from to such an extent as to admit of the stations, that is, the five stations which the company were by that agreement required to build on the Collingwood section of the line, being placed and located at the points in that line specified

Judgment.

OSLER
J.A.

in the new agreement, instead of the old ; (2) It is declared that it shall not be incumbent on the company to erect stations at the places mentioned in the former agreement, but that the places defined for stations in the new agreement, shall be taken to be in substitution for the places mentioned in the former.

This was an entirely unnecessary provision if the two agreements were not to be read together, for the line of route being varied, the former agreement as to placing the stations on the line therein defined became impossible of performance.

I see no reason for giving to the word "establish" in the second agreement a larger meaning than the parties had already given to it, or for thinking that the plaintiffs meant to incur the risk of abandoning their clear right of having the stations kept and maintained as such for seven years.

The construction, in short, which I place upon the second agreement is, that the five stations which, by the first agreement the company contracted to erect, build, complete and establish, were to be so erected, built, completed and established at the places substituted by that agreement for those mentioned in the first agreement ; the line of route of the railway being deviated so far as was necessary to carry that out.

Having established the stations and kept and maintained them for the seven years mentioned in the first agreement, I think the agreement has been fulfilled, and that their obligation is at an end.

I entirely concur in the view that the evidence of representations or statements made as to the meaning of the second agreement, in canvassing the electors and working up public sentiment in favour of the by-law, was improperly admitted. The agreement had been executed. No case is made on the pleadings or evidence for rectification on the ground of mistake, and the meaning of the agreement cannot be controlled or varied or explained by what canvassers or orators, on behalf of the railway, may have said as to their understanding of its effect.

The decree in the former suit between these parties is set up as shewing that the construction of the agreements is *res judicata*. It is not pleaded in the statement of claim, though I do not rest upon that. It is a consent decree based upon the two agreements which are set out in the bill. As the first agreement was relied on in that suit by the plaintiffs, and the seven years had but just begun to run, the right of the plaintiffs to relief upon the footing of that agreement was clear. The second was necessarily set out in the bill to shew the change in the location of the stations, but the plaintiffs might have relied upon it alone, alleging their present view of its meaning, if they had desired to obtain the opinion of the Court as to the obligation of the defendants to maintain or keep up the stations forever. Having pleaded and relied upon the first agreement, it was only necessary to decide, and we cannot see that anything more was decided than that the company were, as things then stood, under the two agreements, bound to keep and maintain the stations then in question. It is impossible to say that the judgment is a declaration of an unqualified liability for all time under the second agreement, and if it proceeds at all upon the first, as it unquestionably does, its binding force must be controlled by the limitation prescribed in that agreement.

Judgment.

OSLER
J.A.

BURTON and MACLENNAN, JJ.A., concurred.

Appeal allowed with costs.

IN THE MATTER OF CLARK AND THE CORPORATION OF THE
TOWNSHIP OF HOWARD.

*Municipal corporations—Drainage Acts—Construction of statute—By-law
for repair of old drain—Assessing land benefited.*

On the 21st September, 1868, a by-law was passed by the Township Council under the provisions of the Municipal Act of 1866—29 & 30 Vic. ch. 51, secs. 281 and 282—for the construction of (among other drains) the M. drain, and the drain was thereupon constructed. On the 11th December, 1883, the Township Council passed a by-law for repairing and cleaning this drain, and directed that the amount required for this purpose should be assessed and levied on the lands assessed for the original construction of the drain. On the 21st September, 1886, another by-law was passed to change, in accordance with the report of an engineer, the assessment made for the original construction of the M. drain so as to enable the assessment for repairing and cleaning the drain to be made more equitably, and a new assessment for repairing the drain was adopted. This assessment for repairing and cleaning the drain was limited to the lands assessed for the original construction of the drain, although the engineer in his report pointed out that large tracts of land not assessed for the original construction of the drain were now benefited by it.

Held, that the provisions of the Act of 1869,—32 Vic. ch. 43, sec. 17,—as to maintenance and repair, [now R. S. O. ch. 184, sec. 583 (1),] are not retroactive, and do not apply to drains constructed before the date of that enactment; and that therefore the township council had no power to pass the by-law in question.

Per HAGARTY, C. J. O.—The by-law was also bad because the assessment for repairs was limited to the lots assessed for the original construction of the drain, and did not embrace the lots subsequently benefited.

Per BURTON, J. A.—Assuming the case to come within the Act of 1866, the assessment was properly limited to the lots assessed for the original construction of the drain.

Decision of ROBERTSON, J., affirmed on other grounds.

Statement.

THIS was an appeal from the judgment of Robertson, J., reported 14 O. R. 598, quashing, with costs, a by-law of the appellants, the corporation of the township of Howard.

On the 21st September, 1868, the municipal council, under the authority of the statute 29 & 30 Vic. ch. 51, secs. 281 and 282, passed a by-law providing for the construction of certain drains in different parts of the township. One of the drains was known as the MacGregor Creek drain. The lands to be benefited by each of the proposed drains were mentioned and set forth in separate schedules, and estimates were prepared, and the assessments for construction properly fixed.

On the 11th December, 1883, the municipal council Statement. passed another by-law to provide for the repairing and cleaning out of the MacGregor Creek drain, and assessed the cost of the work upon the lots assessed for the original construction of the drain, and in the same proportions as in the first by-law. Subsequently, however, the council, thinking the assessment inequitable, instructed an engineer to make a report in the matter, and the engineer in his report pointed out that different portions of the land not assessed for the original construction of the MacGregor Creek drain were now being benefited by it, and also that certain portions of the township assessed for the original construction of the drain were not now being benefited between themselves in the same proportions as had been the case when the original construction took place, and that the assessments should be altered in both respects. The engineer, in accordance with his instructions, made a new assessment for the amount required for repairing and cleaning the drain, but, by direction of the council, against those portions of the township only that were assessed for the original construction of the drain.

On the 21st September, 1886, the council passed the by-law in question in the present proceedings, adopting the new assessment as far as any payments yet to be made were concerned.

An application to quash this by-law was made, and came on for hearing before Robertson J., on the 11th April, 1887, and on the 25th June, 1887, judgment was delivered quashing the by-law, with costs.

From that judgment this appeal was brought, and came on to be heard before this Court (HAGARTY C. J. O., BURTON, PATTERSON, and OSLER JJ.A.) on the 17th September, 1888.

Peyley and *D. Mills* for the appellants. The council in passing the by-law in question aimed only at changing the original assessment made under the by-law passed for the original construction of the work : Consolidated Municipal Act, 1883, sec. 587, sub-sec. 3. The lands subsequently

Argument. benefited by the drain could only be assessed under a separate by-law, and the fact that this by-law does not deal with them is no ground of objection to it: Sec. 590 of the same Act; *Alexander v. Township of Howard*, 14 O. R. 22. The by-laws having been duly registered, and no proceedings having been taken to set them aside within the time limited, have become valid and binding, and cannot be quashed: *Bickford v. Town of Chatham*, 14 A. R. 32.

M. Wilson for the respondents. The by-law is unreasonable, and discriminates against the defendants inasmuch as their lands are assessed for the whole work, while several thousand acres of land benefited have not been assessed. The drain having been constructed under the Act of 1866 and continued into another municipality than that in which it was commenced must now be maintained by the municipality and not by a local assessment: 32 Vic. ch. 43, sec. 17, is not retroactive.

Pegley in reply.

December 22nd, 1888. HAGARTY C. J. O.:—

The substantial ground on which the by-law of 1886 has been quashed is, that the defendants limited the assessment by special direction to their surveyor, to the lands originally assessed by the by-law of 1868 for the construction of the McGregor Creek drain contrary to his strong remonstrance and expression of opinion in his report on which the by-law is based.

The 1868 by-law authorizing the McGregor drain declares that it is to be continued into the township of Harwich, and that the Harwich municipality has been served with a copy of report, and Mr. Lewis' report thereon states the Harwich lands benefited and the assessment thereon. The drain is to run 111 chains (over a mile) into Harwich.

We do not see what the action of Harwich was beyond a motion adopted in the Howard council in 1882 to accept \$150 in full amount of this drain. Harwich has been assessed for the drain \$435.

A by-law was passed by Howard in 1883, reciting the 1868 by-law, to raise \$2,000 for the cleaning out and repairing of this drain, to be assessed on the lots and roads originally assessed,

Judgment.

HAGARTY
C.J.O.

This by-law of 1886 recites the 1868 by-law and that of 1883, and that it was necessary to change the original assessment to make it more equitable and to prevent injustice, and sets out in full the surveyor's report.

He found that some of the originally assessed land could not be assessed for recent improvements, as they drained into the creek below where any improvement was made.

He finds that several named drains had been constructed since the McGregor Creek drain and were using it as an outlet, thus draining some 9,000 acres benefited, paying nothing therefor, and that they ought to be assessed, but under his instructions he confined the assessment to the original lots and lands.

We have now to see whether this course can be justified.

It is clear that this drain was one to be constructed into another municipality. Neither of the subsequent by-laws speak of Harwich, but they are both wholly based upon the by-law of 1868.

Section 576 of the Act of 1883, and following sections, provide for the case of the work continued into another municipality, and provide for settlement of disputes by arbitration.

Then section 584 provides that after the work is completed it shall be the duty of each municipality in the proportion determined by the engineer or arbitrators (as the case may be) or until otherwise determined by the engineer or arbitrators, to preserve, maintain, and keep in repair the same within its own limits, "either at the expense of the municipality or parties more immediately interested, or at the joint expense of such parties and the municipality, as to the council upon the report of the engineer or surveyor may seem just."

Section 587 declares that when after completion, the work has not been continued into another municipality, or

Judgment.

HAGARTY
C.J.O.

when the lands or roads of such other are not benefited by such work, it shall be the duty of the municipality making such work to maintain and keep in repair the same "at the expense of the lots, parts of lots and roads, as the case may be, as agreed upon and shewn in the by-law when finally passed."

It is asked what by-law is here meant, the original or the by-law to be passed for the costs of repair.

The same section provides for the case of a drain made out of the general funds before February, 1876, the council may pass by-law on the Engineer's report for its maintenance, assessing lots and roads benefited, &c., and lastly, may change the assessment from time to time on the Engineer's report.

Section 589. When the repairs under section 584 or 587 are so extensive as to make it not expedient to levy in one year, they may pass a by-law to borrow the money, and levy on the property benefited a special rate, &c.

Section 590. If a drain already or hereafter to be constructed is used as an outlet by another municipality, company or individual as an outlet, etc., the municipality, company or individual using such drain as an outlet may be assessed as may be ascertained by engineer or arbitrators for the construction and maintenance, etc.

It seems to me that this drain, running a considerable distance in Harwich, falls under the sec. 584, and the costs of maintenance are not thrown solely and absolutely on the lands originally assessed for construction, but on the funds of the municipality or parties more immediately interested, or at their joint expense, and that the report of an engineer should be first had declaring in his judgment who the parties or lands immediately interested may be.

But if the case fall within sec. 587 then, reading that section with 589, which specially names it with 584, it seems to me that "properties benefited" are those to be assessed on the report of the engineer. I do not think that the words as to lots "shewn in the by-law when finally passed" must necessarily mean the old by-law of 1868

passed 18 years before, but the by-law to be passed by the council to make the assessment for maintenance. The words "by-law when finally passed," would hardly be used as to the old by-law, which, till finally passed, would not be a by-law of the township.

Judgment.
HAGARTY
C.J.O.

I think the reference to this section in sec. 589, shews that the Legislature as to both 584 and 587, clearly designed to make the assessment in each fall alike on the lands found to be benefited. It would not be necessary to rely on this last opinion, if we be right in holding this by-law as governed by sec. 584, as the work ran into the other township.

The whole scope of the Act seems to me to aim at throwing the burden of cost and maintenance on the properties benefited.

In that view I agree with the Court below that this by-law cannot be supported.

In this view it may not be necessary to discuss further the point as to the effect of the Chancery suit: *Alexander v. Township of Howard*, 14 O. R. 22, holding the by-law of 1883 void as against two of the relators in this case. The defendants did not appeal against that decision.

Great difficulty might, and certainly much confusion must, be experienced in upholding and enforcing the present by-law when that of 1883, on which it is largely based, is done away with.

I do not think we can accept Mr. Pegley's argument that the council may yet, under sub-sec. 3 of sec. 587, re-adjust this assessment from time to time and thus relieve any injustice, or by subsequent enactment, gather in the parties not now included to make them share the burden of maintenance.

If on these points we had taken a different view, we should have to consider a very important question raised by the respondents as to whether the clauses as to the maintaining and repairing a drain constructed under the law as it stood before assessments were authorized for such purpose, was so clearly retrospective as to be applicable to this drain constructed under the by-law of 1868.

Judgment.

HAGARTY
C.J.O.

My learned brothers have come to the conclusion that the legislature has not retrospectively placed the burden of maintenance on the petitioners for the drain in 1868, at which time no such liability existed.

I have not considered that point so fully as they have; but I do not dissent from their view, but on the contrary, I think, so far as I have examined the question, that they are right. The result is the same.

BURTON J. A.:—

I have come to the conclusion that this appeal should be dismissed, although not on the same grounds.

This drain having been originally constructed under the Act of 1866, it became the duty of the municipality, or of each of the two municipalities, to preserve, maintain and keep the same within its own limits; and I have failed to find any enactment which transfers this liability to the persons whose lands were originally found to be benefited by the construction, or any power to make an assessment against them or the present owners of those lands.

The Act of 1883 applies, to my mind, only to works to be undertaken under its provisions, except in certain cases, as for instance, under sec. 587, subsec. 2, where works had, previously to the 10th February, 1876, been constructed out of the general funds of the municipality. Then the engineer is required to ascertain what lots, or parts of lots, or roads, are benefited by the work, and the corporation may then pass a by-law for keeping it in repair at the expense of those lots, or parts of lots, in the same manner and with the same right of appeal as provided for works to be undertaken under the provisions of the Act of 1883.

And again by sec. 570, sub-sec. 16, the provisions of that section of the Act, are made to extend to work which had been executed, or partly or insufficiently executed under any Act of Ontario or the old Province of Canada, in which case the steps may be taken as if it were a work of original construction under that Act, but this does not profess to give power to assess for repairs to a

work undertaken under the Act of 1866 on the petition of the parties benefited.

Judgment.

BURTON
J.A.

I do not think the Act is otherwise retrospective.

If this view be correct it disposes of the matter, but I have a strong impression that if the Act applied the course pursued by the council was not open to some of the reflections made upon it. The first step taken by the council is to procure plans and estimates to be made by an engineer or surveyor and an assessment to be made by him of the real property to be benefited by such works, stating as nearly as may be the proportion of benefit to be derived therefrom.

If the council decides to proceed with the work, it passes a provisional by-law containing a copy of the engineer's report. Parties affected by it may appeal against the assessment made by the engineer, or may claim that parties whose lands are benefited have been improperly omitted, and if alterations are made by the Court of Revision or the County Judge the whole assessment *pro rata* is to be varied so that the aggregate amount shall be the same as if there had been no appeal.

Such is the nature of the proceedings for the original construction of the works, and, as I have said, originally the onus of keeping them in repair fell upon the township or upon the townships if more than one, the proportion to be paid by each being determined by the engineer subject to an appeal to arbitrators.

The proportion so ascertained to be borne by each municipality applies also to the repairs, unless upon a change of circumstances the engineer or arbitrators under the same formalities determine that an alteration should be made.

It is then within the power of each municipality to decide whether the expense of the repairs shall be borne exclusively by the municipality or at the expense of the parties more immediately interested or at the joint expense of both, having first obtained a report of the engineer for their guidance.

Judgment.

BURTON
J. A.

It strikes me as somewhat strange that when the work and the benefit of it is confined altogether to one municipality no such powers appear to be given to the corporation to apportion the expense of keeping the work in repair, but in that case it is to be at the expense of the lots, parts of lots and roads, as the case may be, as agreed upon and shewn on the by-law when finally passed (sec. 587) meaning, I apprehend, the by-law originally providing for the construction; but in that case the council may, from time to time, change such assessment on the report of the engineer.

It is not very apparent why such a distinction should be drawn, and I merely refer to it as indicating to my mind a clear intention that the assessment for repairs should not extend beyond the roads and lots first assessed for the construction, although that assessment as well as the proportion to be paid by each township, might be varied according to circumstances.

I am at a loss to see, if this be the true view of the law, how anything improper was done by the reeve in giving instructions to the engineer to confine himself to the original assessment. It was done under legal advice, and as at present advised, I incline to think correct legal advice, assuming this case to come within the Act. Nor do I see that the Court of Revision was not quite within its rights when it added certain lots omitted by the engineer; if done upon proper notice to the parties affected.

Whether, as the learned Judge assumes, the Court of Revision unjustly lessened some assessments and unjustly increased others, leaving others again undisturbed, is a matter that cannot be enquired into in this way if such be the fact. It is one on which it is impossible for us to offer an opinion in the absence of the evidence on which these decisions were based. The remedy was by appeal to the County Judge.

I think at present that the course pursued by the council in these respects is the correct one. I have not considered the other objections urged to the sufficiency of the

by-law because I think there was no authority in the council to make a special assessment for the maintenance and repair of this drain, to which the whole township is bound to contribute.

Judgment.

BURTON
J.A.

On this ground I think the appeal should be dismissed.

OSLER J. A. :—

I am of opinion that the appeal should be dismissed for the following reasons. The drain in question was constructed under a by-law passed on the 21st September, 1868, under the provisions of the Municipal Act of 1866, 29-30 Vic. ch. 51, secs. 281, 282, which required the cost of the construction of the drain to be met by an assessment of the real property immediately benefited, while the duty of maintaining, preserving and keeping it in repair after its completion was cast upon the municipality; and where it extended into another municipality, which is the case here, the duty of each was to keep in repair that part of the drain within its own limits. The only liability contemplated by persons petitioning for the construction of drainage works under that Act was the cost of the original construction. The council were only authorized to pass the by-law if in their opinion the work was one which would greatly benefit the township, and, as a township work, it was to be kept in repair by the municipality. See sec. 282, and sub-secs. 9 and 16.

By an Act passed in 1869, 32 Vic. ch. 43, secs. 281 and 282 were repealed, and new sections and sub-sections were substituted therefor, to be taken and read in place of the repealed sections and sub-sections. Section 8 of this Act corresponds with sub-section 9 of the repealed section 282, and is section 577 of the present Act, R. S. O. ch. 184. Section 17 which seems to take the place of sub-section 16, enacts that, after the deepening and drainage is fully made and completed, it shall be the duty of each municipality in the proportion determined by the engineer or arbitrators, as the case may be, or until otherwise deter-

Judgment.

OSLER
J.A.

mined by the engineer or arbitrators, under the same formalities as near as may be, as provided in the preceding sections, to preserve, maintain and keep the same, that is, the deepening and drainage, in repair within its own limits, either at the expense of the municipality, or parties more immediately interested, or at the joint expense of such parties and the municipality, as to the council upon the report of the engineer may seem just.

This enactment, in substantially similar terms, is found in all the subsequent consolidations or repetitions of the Drainage or Municipal Acts, and is sec. 459 of the Municipal Act of 1873, where it is credited to the Drainage Act of 1872, 35 Vic. ch. 26, sec. 16, re-enacted in the Drainage Act of 1873, 36 Vic. ch. 39, sec. 17, and passes into R. S. O. ch. 174, sec. 542, and thence to the Municipal Act of 1883, 46 Vic. ch. 18, sec. 584, and R. S. O. (1887) ch. 184, sec. 583. The municipality were therefore at liberty, in case of a drain of this class, to adopt such one of three courses, as, upon the report of the engineer, they might deem just: (1) They might assume the cost of its maintenance as a township work; (2) They might throw it wholly upon the parties more immediately interested, whatever that expression may mean; or (3) They might maintain it at the expense of such parties and the municipality.

In the Drainage Act of 1872, 35 Vic. ch. 26 sec. 16, we find a new provision introduced, relating to drains which do not extend into another municipality, or which do not benefit the lands or roads in another municipality. In the case of drains of that class the municipality has no such option, but must keep them in repair at the expense of the lots, parts of lots and roads as the case may be, "as agreed upon and shewn in the by-law when finally passed." This provision was first made part of the Municipal Act in 1873, 36 Vic. ch. 48 sec. 460 and is now R. S. O. ch. 184, sec. 586 (1) (see 36 Vic. ch. 39, sec. 17, R. S. O. 1877, ch. 174, sec. 543, 46 Vic. ch. 18 sec. 587). Some of these sections were considered in the case of *White v. Township of Gosfield*, 10 A. R. 555.

The question is, whether the substituted section of the Act of 1869 or that which now represents it is applicable to a drain constructed under the original Act of 1866.

Judgment.

OSLER

J. A.

Mr. Mills contended that the change introduced by the Act in respect of the duty and liability of keeping in repair drains extending into another municipality had a retrospective operation and argued that the Municipal Acts are to be read as a continuous enactment. That may be so when the law which is sought to be applied is merely a repetition or consolidation of previous enactments, but not when changes are introduced by which liabilities of a different or more onerous nature are sought to be imposed upon persons who have taken advantage of a former Act or by which existing rights may be affected. In such cases the ordinary rule of construction must prevail and we must see whether the Legislature has expressed a clear intention to alter the position of those persons who have proceeded under the repealed clauses, in other words, to make the substituted clauses retrospective. As was said in *Brown v. McLachlan*, L. R. 4 P. C. 543: "If a statute professes merely to repeal a former statute of limited operation, and to re-enact its provisions in an amended form, an intention to extend the operation of its provisions to classes of persons not previously subject to them is not to be presumed as a necessary inference unless the intention to the contrary is clearly shewn." The case of *Ex parte Todd, re Ashcroft*, 57 L. T. N. S. 835, at p. 838, may also be referred to on this point.

In my opinion the new sections introduced by the Act of 1869 and continued to the present time are confined to works instituted under them, except where special provision has been made with regard to works constructed under former Acts. We find an instance of this in subsec. 16 of sec. 570 of 46 Vic. ch. 18, and of sec. 569 R. S. O. ch. 184, taken from 45 Vic. ch. 26 sec. 1. There it is enacted that the provisions of the section shall be deemed to extend to the re-execution or completion of any works which have been executed or have been partly or

Judgment.

OSLER

J. A.

insufficiently executed under any provisions of any Act of the Ontario Legislature or of the Parliament of the Province of Canada. In such case proceedings are commenced, as it were, *de novo*, and the drain is completed or re-executed under the provisions of the existing law.

So again by section 587, 46 Vic. ch. 18, which probably relates exclusively to works not extending beyond the municipality in which they are commenced, or not benefiting the lands or roads of another municipality, it is provided (sub-sec. 2) that where similar works have been constructed out of the general funds of the municipality (the limitation to works constructed prior to 10th February, 1876, was repealed by the Act 50 Vic. ch. 29, sec. 40) the council may without petition, on the report of an engineer, pass a by-law for preserving, maintaining and keeping the same in repair at the expense of the lots, parts of lots and roads benefited, in the same manner, by the same proceedings and subject to the same right of appeal as is provided in regard to works made and completed "under the provisions of this Act."

Section 586, 46 Vic. ch. 18 (sec. 585 of the present revised Act) may also be referred to. It confers upon the council of the municipality, or of any municipality whose duty it is to maintain and preserve any drain constructed under the Drainage Act of 1873, or R. S. O. 1877, ch. 33, power to change the course of the drain, make a new outlet or otherwise to improve or alter it, and to undertake and complete the requisite works under secs. 570 to 583 without the petition required by sec. 570.

Section 574, (46 Vic. ch. 18) provides that, in case any by-law already passed, or which may be hereafter passed, for the construction of drainage works by assessment upon the real property to be benefited, and which has been acted upon by the construction of works in whole, or in part, does not provide sufficient means, or provides more than sufficient means, for the completion of the works, the council may from time to time amend the by-law in order to fully carry out the intention thereof, and of the petition on which it was founded.

I am not aware of any provision in all the legislation which has taken place on this subject which enables a municipality to charge the lands or parties benefited for the repair of such a drain as is in question here, constructed under a by-law passed pursuant to the Act of 1866 as it originally stood.

Judgment.

OSLER
J.A.

Such a drain may be said to have been constructed under a contract between the municipality and the parties petitioning for it, and *qua* repairs, no liability was assumed by the latter or has been authorized by the Legislature, or can be imposed by the Council. This, I think, was a fatal objection to the by-law of 1883 in question in the case of *Alexander v. these Defendants*, 14 O. R. 22, which was passed in order to enable the council to raise money by the issue of debentures for the express purpose of cleaning out and repairing this drain, and assessing the land therein mentioned for the payment of the debentures. The by-law of 1886, in question in the present proceedings, is open to the same objection. It recites the by-law of 1883, and then recites that in the opinion of the council it has become necessary to change the assessment imposed by that by-law for the purpose of making it more equitable, and to prevent injustice in levying the assessment. Its inherent vice is that it is an attempt to levy upon the particular lands the expense of repairing the drain without any legal authority for so doing.

It has not been suggested that it was passed as an amendment of the original by-law of 1868, under sec. 574, if, indeed, that section applies to a drain of this class; nor does it profess to be an amendment of the by-law. Nor can it be supported as a by-law for the re-execution or completion of a work partly or insufficiently executed under a former Act (sec. 570, subsec. 16). It was not originated as a by-law of that character, and if it had been it would, in that case at all events, have been clearly bad for limiting the scope of the engineer's inquiry as to the lands which would be benefited thereby, if not for other reasons also, such as the absence of a petition.

Judgment

OSLER
J. A.

The judgment of the Court below proceeded, I think, upon the ground that the new assessment for repairs had been improperly limited by the council to the lands which had been assessed for the original construction, instead of being imposed upon all the lands which, in the opinion of the engineer, might now be found to be benefited by the drainage.

In the view I take of the case, it is unnecessary to decide this point, which I regard as one of some difficulty, at all events as regards a drain continuing into or benefiting lands or roads in another township. In the case of drains of the other class, the right to change the assessment under sec. 587, sub-sec. 3, especially as amended by the Act of 1887, now R. S. O. ch. 184, sec. 586 (3), seems reasonably clear; but sec. 584 (583 of R. S. O. ch. 184) is more obscurely phrased, and presents some difficulties in its application, well worthy the attention of the legislature.

I agree in affirming the judgment.

As to the non-retroactive character of the Act of 1869 the following cases may be referred to: *Regina v. Justices of the West Riding of Yorkshire*, 1 Q. B. D. 220; *Attorney General v. Lamplough*, 3 Ex. D. 214; *Butcher v. Henderson*, L. R. 3 Q. B. 335; *Regina v. Inhabitants of Denton*, 18 Q. B. 761; *Surtees v. Ellison*, 9 B. & C. 750; *Churchill v. Crease*, 5 Bing. 177; *Kay v. Goodwin*, 6 Bing. 576; *Morgan v. Thorne*, 7 M. & W. 400; *Rutter v. Chapman*, 8 M. & W. 1; *Simpson v. Ready*, 11 M. & W. 344. Whether the township are liable to make the repairs, notwithstanding the repeal of the original section: see *Creighton v. Pragg*, 21 Cal. 115.

PATTERSON J. A., having, since the argument, been appointed one of the Justices of the Supreme Court of Canada, took no part in the judgment.

Appeal dismissed with costs.

IN THE MATTER OF THE OAKWOOD HIGH SCHOOL BOARD
AND

THE MUNICIPAL COUNCIL OF THE TOWNSHIP OF MARIPOSA.

Public schools—High schools—Application for municipal grant—R. S. O. ch. 226, secs. 25 and 35.

Held, that the words "maintenance, accommodation and other necessary expenses" in sub-sec. 6, of sec. 25, R. S. O. ch. 226 include the purposes mentioned in sec. 35, (1) and consequently that an application under sec. 35, (1) must be made before the first day of August.

Held, also, that an application under sec. 35, (1) must be the corporate act of the school board, not merely the verbal request (however unanimous) of the individuals composing it, and must specify the purposes for which the money is required.

Held, also, (MACLENNAN, J. A., dissenting) that to come within the provisions of sec. 35, an application must be an independent application for purposes mentioned in that section, and that an application combining other purposes with these purposes, may be rejected by a simple majority vote.

Held, also, that an application under sec. 35, may be rejected by the council, although no formal by-law relating to the purposes of the application is before the council, and the meeting at which the rejection takes place, has not been called for the special purpose of considering such a by-law.

Per MACLENNAN, J. A.—*Quære*, whether a township comes within the Act.

Decision of BOYD, C., reversed.

THIS was an appeal from the judgment of Boyd C., Statement. reported 15 O. R. 686, directing that a peremptory writ of mandamus be issued commanding the municipal council of the township of Mariposa to forthwith raise the sum of \$4,000 and pay the same to the Oakwood high school board.

The question involved in the appeal was the construction of the High School Act, R. S. O. ch. 226 and particularly sections 25 and 35. The facts are shortly as follows: The high school inspector having from time to time complained of the inadequacy of the accommodation provided at the high school of Mariposa and the Government having threatened to withdraw their grant, the high school board at a meeting held on the 9th June, 1887, passed the following resolution:

Statement. In consequence of communications to the High School Board from the Education Department with reference to the inadequate condition of our High School Building, the last communication stating in effect that some action must be taken at once in the matter of providing increased accommodation, therefore the High School Board, finding themselves forced to provide increased accommodation for High School purposes, or otherwise lose the Government grant, in consequence the High School will cease to exist. We have considered the matter and have concluded it would be better in the interest of the school, to build a new building, which would, according to the promise made by the Department, entitle us to a sufficient percentage to pay for the building and equipment in a few years, in preference to paying out about one-third of the amount required for a new building without any certainty of receiving anything from the Government, and no chance to purchase sufficient ground in connection therewith; and we would hereby ask your honorable Council to grant us the privilege to build a school house on the Township property, south of the Township Hall, and use of the grounds in the rear to be used as a playground, and to raise for us by debentures the sum of \$3,000 to build a new school house, and equip the same.—Carried.

On the 23rd June, 1887, a resolution amending this resolution was carried by inserting the sum of \$4,000 instead of \$3,000. On the same day a petition in accordance with the terms of the resolution, was presented by the board to the Municipal Council which was then in session, and a resolution was passed in council that the petition "be received." On the 18th July, 1887, the council considered the petition, and a resolution was passed refusing to grant the petition. The council was composed of five members, a reeve, two deputy reeves, and two councillors, and all the members were present at the meeting of the 18th July, 1887, and the resolution rejecting the petition was passed by a vote of four to one. No by-law in regard to the matter of the petition was before the council.

Certain members of the high school board were present at the meeting of the council on the 18th July, when the petition was rejected, and they orally then stated to the council that they would present to the council a by-law for the grant to them of the sum of \$4,000, for school purposes, without any request for the gift of a site in addition. No formal resolution from the high school board was passed at this time, or submitted to the council. On the 8th

August, at a meeting of the high school board, a resolution was passed that the board submit a by-law for the grant of \$4,000 for high school purposes, to the township council. This by-law was duly prepared and submitted to the township council on the same day. Statement.

The council then assumed to accept and pass the by-law presented by the high school board; two members voting for the acceptance and three members voting against it; and also assumed to read a first time the by-law to authorize the council to raise the sum of \$4,000 demanded. On the 10th October, 1885 the council assumed to read a second and third time, and pass, the by-law, two members voting for the by-law and three against it. Nothing further was done by the municipal council until the 16th January, 1888, when a by-law was passed by them repealing the former by-law. The high school board had demanded payment of the sum of \$4,000 from the municipal council pursuant to the by-law, but payment had been refused and these proceedings were thereupon taken.

The application came on to be heard before Boyd C. on the 24th day of April, 1888, and on the 27th day of April, 1888, judgment was delivered granting the application and directing the issue of a peremptory writ of mandamus commanding the municipal council to forthwith raise the sum of \$4,000.

From this judgment the municipal council appealed, and the appeal came on to be heard before this Court (HAGARTY C. J. O., BURTON, OSLER, and MACLENNAN JJ. A.) on the 22nd November, 1888.

Moss Q. C. and D. J. McIntyre for the appellants.

Hudspeth Q. C. and Watson for the respondents.

December 22nd, 1888. OSLER J.A. :—

This is an appeal from the judgment of the Chancellor ordering a peremptory writ of mandamus to issue to the council commanding them forthwith to raise the sum of \$4,000 for the building and equipment of a high school in

Judgment.

OSLER
J.A.

the village of Oakwood, and to forthwith pay the same to the Oakwood high school board, or to the treasurer of said board.

The mandamus was opposed and this appeal is supported chiefly on two grounds; first: that no demand or requisition for the money with which the council were bound to comply, had been made by the high school board; and second, that the board were attempting to procure the whole sum from the township exclusively, without regard to the incorporated village of Woodville in the township, which formed, as it was said, part of the high school district.

The obligation of a township municipality to furnish money for the use of a high school as distinguished from their discretionary power under section 36, is found in section 32 of the High School Act, R. S. O. ch. 226. "In the case of every high school in a * * * township, an amount equal to the amount paid by the Government, shall be paid by the municipal council of the county in which such high school is situated, upon the application of the high school board, and such other sums as may be required for the *maintenance* and *accommodation* of the said high school * * shall be raised by the council of the municipality in which the high school is situate upon the application of the high school board."

In the case of *The Niagara School Board*, 1 A. R. 288, it was held that these words "maintenance and accommodation," would comprise "the erecting or providing proper buildings for the scholars, warming and keeping them (the buildings) in order, and the general management and support of the school."

One limitation upon the power of the board to compel the council to raise money for them is, that their requisition must be made before the 1st of August in any year. This has long been the law as regards public schools, but I think it was first applied to high schools by 48 Vic. ch. 50, sec. 25 (6); R. S. O. ch. 226, sec. 25, sub-sec. 6.

Another limitation is found in section 35, sub-sec. 1,

which enacts that "In any case where a high school board may require the municipal council to raise or borrow a sum of money for the purchase of a school site, or the erection or purchase of any school house or addition thereto, or for the purchase or erection of a teacher's residence, such municipal council may refuse to raise or borrow any such sum when it is so resolved by a two-thirds vote of the members present at the meeting of the council for considering any by-law in that behalf."

Judgment.

OSLER
J.A.

In that case, as provided by sub-sec. 2, the question is to be submitted by the council, if so requested by the school board, to the vote of the electors, and the council are only bound to raise or borrow the money if the electors assent to it.

The moneys now sought to be obtained from the council, are for the purposes, or some of the purposes, mentioned in sec. 35 (1), and it is to be observed that there is nothing in the Act which authorizes the board to require the council to raise money for those purposes if they are not included in the general term "maintenance and accommodation," already referred to, in section 32. Consequently the application therefor must be made to the council before the 1st of August, as required by sec. 25, sub-sec. 6. The object of fixing this as the date by which the application must be made, is apparent. It is that the council may be in a position to raise the sum required, by placing the whole of it, if they think proper, on the collector's roll for the year, or to pass a by-law for borrowing it, and for raising yearly, including the year in which the demand is made, the amount required to meet the debentures issued under the by-law.

The first question is, therefore, whether before the 1st of August, 1887, any such application was made by these respondents as they now seek to enforce, and as the appellants were bound to comply with?

It has been pointed out that, within certain limitations, the council have no discretion. The application being made in time, and in good faith, they must raise or borrow

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J.A.

the sum demanded, whatever be the amount, for any purposes coming under the head of maintenance and accommodation other than those specified in sec. 35, subsec. 1, and for those purposes also, unless two-thirds of the members of the council are opposed to it; in which case, if the trustees require it, they must submit the question to the vote of the electors. Before, therefore, they can be compelled to tax the ratepayers for moneys over the expenditure of which they have no control, they have the right to insist, not only that the application upon which they are to act shall be made in time, but also that it shall be the corporate act of the high school board, not merely the verbal request (however unanimous) of the individuals composing it, and shall specify the purposes for which the money is required.

Now the facts which appear on the affidavits made in support of and in opposition to the motion, shortly are, that at a meeting held on the 9th June, 1887, the high school board passed a resolution to present a petition to the council, which after setting forth the necessity for increased accommodation, &c., concluded as follows:

(The learned Judge read the resolution p. 646 and continued.)

On the 23rd June another meeting of the board was held at which an amendment was passed, increasing the amount asked for.

(The learned Judge read the resolution and continued.)

On the same day the petition as thus amended was presented by the trustees to the council which was then in session. The only action then taken thereon by the council was to receive it.

Another meeting of the council was held on the 18th July at which the petition was considered, and a resolution was carried by a vote of four to one, "that the council do not grant the prayer of the petition."

It was contended that even though the petition had thus been rejected by a two-thirds vote of the council, it was still before them, and they had not refused to raise or borrow the money within the meaning of sec. 35, subsec. 1,

not having done so "at a meeting for considering any by-law in that behalf." The effect of the action of the council, however, in my opinion, was to reject the petition or application *in toto*. It was no longer before them for any purpose, and was one which might have been rejected by a mere majority vote ; combining, as it did, two objects, viz., permission to build on the township property, and to raise \$4,000 to erect and equip school buildings thereon.

Judgment.

OSLER
J.A.

Even if the council had been considering a by-law founded upon the petition, and had refused to pass it, they could not, upon that refusal of an application so framed have been compelled by the trustees, under sec. 35, sub-sec. 2, to submit to the electors the question whether the money should be raised, and for the simple reason that no independent application therefor had been submitted to, or considered, or refused by them. The trustees could, no doubt, as the learned Chancellor says, have renewed their application in a modified form, limiting it to what they were strictly entitled to demand ; but this would be a new and original application, to be dealt with on its own merits, and if made too late, or on other grounds defective, would not be aided by the fact that a previous one had been made which the council had the right to reject, as they did, absolutely.

When the council rejected the petition, it appears to have been verbally stated to them by the members of the board present in the council room that, at a subsequent meeting of the council, the board would "present a formal by-law for the purpose of being considered by the council," and that the only demand they would make would be for the grant of \$4,000, and that they would "consent to forego" the grant of the school site as asked for in the petition.

If language of this kind is relied upon as a demand or application, I can only say that I do not think that the council were bound to take any notice of it.

Nothing further was done until the 8th of August, 1887, when the board met and passed the following resolution

Judgment.

OSLER
J.A.

“Moved by Dr. Jeffers, seconded by Thomas Davidson—That the Board submit a By-law for \$4,000 for High School purposes to the Township Council.—Carried.”

in pursuance of which a by-law was framed by them, and on the same day presented to the council then in session.

In council a resolution was proposed and rejected, to reconsider “the motion for refusing the trustees of the high school the sum of \$4,000, which was carried at the last meeting of the council.”

Thereupon a resolution was carried that the council accept and pass by-law No. 352, presented to the council by the trustees of the high school to raise the sum of \$4,000 for high school purposes.

This resolution appears to have been a formal proceeding under the rules of the council preparatory to the consideration of the by-law, being followed by another resolution in pursuance of which the by-law was read a first time. No further proceedings were taken thereon until the meeting of the council held on the 10th October following. when it was proposed to read the by-law a second time, A resolution to that effect was lost, three of the council out of five, voting against it, but the Reeve, notwithstanding, declared it carried because it had not been rejected by a two-thirds vote of the members present at the meeting. On the same occasion a resolution that the by-law be read a third time and passed, was lost by a similar vote, but declared carried, by the Reeve, for the same reason.

The affidavit of Gunnings, the clerk of the council, shews that up to the time of thus passing the by-law, no other demand had been made or petition presented to the council.

It appears that the councillors who voted against the by-law, did so because they wished the question of granting the money to be submitted to the electors.

I think a by-law thus carried cannot be considered a by-law of the corporation.

The Municipal Act, R. S. O., ch. 184, section 235, enacts that when a council consists (as in the present case)

of only five members, the concurrent vote of at least three shall be necessary to carry any resolution or measure.

Judgment.

OSLER
J.A.

If an exception is introduced by section 35 sub-secs. 1 and 2 of the High School Act, it can only arise in a case where the council are dealing with a demand of the trustees which they are by law bound to comply with, if not rejected by a two-thirds vote. In any other case the general rule must apply.

I think it clear that there was no valid requisition before the council. The first had been legally rejected; the second, if the presentation of a draft "by-law" by the trustees can be considered as a demand, was too late, and it might be rejected by a mere majority vote.

No doubt sub-sec. 4 of section 35, enables the council, if they deem it expedient to do so, to pass a by-law without submitting it to a vote of the electors, but that means to pass it in the regular way, and not by a minority vote.

On the 16th January, 1888 the council passed by-law No. 358 to repeal by-law No. 352. This it appears to me was a judicious and proper course to adopt, if, as I think the former by-law was irregular or defective, for it had been registered by the clerk at the instance of the reeve, and debentures had been prepared under it, though not issued or completed. I think too, it was in any case within the power of the council to repeal the former by-law, for even if, by reason of its having been properly demanded, their duty was to raise the money, they were not bound to do so by means of debentures.

On the whole it appears to me, with great respect, that the application of the board for a mandamus should have been refused, and the rule to quash by-law No. 358 should have been discharged. The appeal being allowed on this ground, it is unnecessary to consider the question whether the village of Woodville had ceased to be a part of the high school district, so as to be exempt from liability to contribute to the maintenance of the high school.

Judgment. HAGARTY C. J. O.:—

**HAGARTY
C.J.O.**

I agree with the judgment just delivered by my brother Osler.

I think the statute requires that the application for the money here required be made "on or before the 1st day of August," and the reasons therefor are obvious. It is quite true that in the sub-division 6, in which that day is mentioned, nothing is said as to purchasing of site or erection of buildings, but the words are "maintenance, accommodation, and other necessary expenses of their high school, and as said council is required by this Act to raise by local assessment for these purposes."

This is in a sub-section of the section 25 prescribing the duty of the high school trustees, who are required in sub-section 3, "to do whatsoever they may deem expedient with regard to erecting, repairing, furnishing, and keeping in order the building of such high school."

Then section 35 specially provides for those requiring money for the purchase of a school site and erection of buildings, and as to the two-thirds vote.

The words just quoted in sub-section 6 of section 25, would seem to include *all* sums that the council *is required* by the Act to raise,—section 32.

It was not argued before us that section 36 assisted the respondents' view, as separating, as it were, the making provision by assessment "in addition to that required to be made by this Act," for procuring school sites and renting, building, &c., of schools.

But it is to be noticed that this section seems only to refer to discretionary powers and not compulsory.

Apart from the decision of this Court in *The Niagara School Case*, 1 A. R. 288, it would certainly be most in accordance with the whole scheme of the Act to hold that all requisitions for money, on which the municipality is compelled to act, should be made on or before the 1st August.

But even if this be not required, I consider the objection of a proper legal requisition to the council never

having been made must be fatal to the claim for mandamus. Judgment.

A requisition to bind the municipality to action must be confined to legal objects, and not confused with matters which the council can either grant or refuse at their discretion.

HAGARTY
C.J.O.

I cannot consider that any actions of the council as to the by-law prepared by the trustees can govern the case. The trustees had no right to dictate the terms on which the council was to act, or to require or provide for debentures being issued. The money required was to be raised by assessment or borrowed at the option of the council.

I consider that in no way can we look upon the presenting of the by-law by the trustees in the light of a legal requisition for money under the statute.

I cannot regard this decision as proceeding on technical grounds. I think it most important that the plain requirements of the statute should be observed, and nothing but mischief and unpleasant and painful multiplications of contradictory affidavits can result from a departure from the required course of procedure.

The appeal book before us is a strong illustration of the costly and useless accumulation of contradictory statements by parties as to what took place in attempting to supply the want of proper procedure.

I think the Court should direct the disallowance on taxation of a very large portion of the affidavits produced, dealing as they do with matters of opinion as to the advantages or disadvantages of the school system, or the causes which led to the defeat or election of certain candidates.

BURTON J. A. concurred.

MACLENNAN J. A. :—

By 47 Vic. c. 62 (O.), Woodville was incorporated as a village and separated from Eldon and Mariposa. On 23rd June, 1887, the high school board passed a resolution requesting the township to give them a site on the township

Judgment.
MACLENNAN
J.A.

ground for building and play ground, and \$4,000 for building. On 18th July, the requisition presented to the council was refused by a vote of 4 to 1. All the members of the school board but one were present at the council meeting. The members say they then told the council they would apply for the money alone, dropping the request for the site. Nothing further was done till 8th August, when the council met again. A resolution was passed refusing to reconsider the former vote. Then a motion was made to adopt a by-law granting \$4,000 to the school board. The vote was three contra, two for. The motion was declared carried, on the ground alleged, that a requisition by a school board can only be defeated by a two-thirds vote. The by-law was to raise \$4,000 and pay it to the school board. On the same 8th August the by-law was read a first time. On the 20th October it was read a third time on the same division, and declared carried. After the election, namely, 16th January, 1888, a by-law was passed repealing the former by-law. The application for mandamus contained also an application to quash the repealing by-law. The learned Chancellor did not quash the by-law, but did not dismiss that part of the application.

It is doubtful whether a township is liable to provide funds for high school purposes. The Municipal Act authorizes counties, cities, and towns expressly to do so, but does not authorize townships. It is said, however, that several decisions have held townships liable under sec. 25, subsec. 6, and sec. 32 of the High School Act; but, no case in appeal has been cited which has so held. There is no provision by which, in a case like this, Woodville and Mariposa can be made to contribute their proper proportions. But if the county provided the funds, they could collect it from both the township and the village.

The county council declared the Oakwood high school district to be the township. I incline to think that Woodville, or rather the part south of the township line, is still part of the section, and liable to contribute. But if the municipality was otherwise liable, and requisition duly

made, I should think merely not making demand on Woodville would not be a sufficient answer to the school board.

Judgment.
MACLENNAN
J.A.

I think the requisition of 23rd June was good enough. It did ask for \$4,000. I do not see why that was not good, although it also asked for a site. Then I think that requisition was voted down on the 18th July, and the council could not act without a fresh requisition, which never came. I think the requisition is the thing that obliges the township. They can escape by a two-thirds vote, but not otherwise. If they can't get a two-thirds vote, they must comply. But it is by virtue of the requisition, not by virtue of the ineffectual vote. The notion that the by-law was carried by the vote of a minority, is not maintainable. It could not be declared carried as it was, and the requisition and promulgation of the by-law were of no effect.

With regard to the time limit. It is of no consequence here, because no second requisition was ever made upon the council.

I therefore think, with great deference, that the judgment is wrong, and that the mandamus should not have been granted.

I think also that the motion to quash the repealing by-law should have been refused. The by-law was clearly void, but an appearance of validity was given to it by its being signed and sealed, and promulgated, and it was quite proper to repeal it. The repeal also was on 16th January within the three months allowed for moving to quash.

Appeal allowed with costs.

WEIR V. THE CANADIAN PACIFIC RAILWAY COMPANY.

Railways—Highway crossing—Omission to give statutory warning—Contributory negligence.

A traveller on approaching a railway crossing is bound to use such faculties of sight and hearing as he may be possessed of, and when he knows he is approaching a crossing and the line is in view, and there is nothing to prevent him from seeing and hearing a train if he looks for it, he ought not to cross the track in front of it, without looking, merely because the warning required by law has not been given.

Statement.

THIS was an appeal by the defendants from the judgment of the Judge of the County Court of the County of Ontario, in a case tried by him without a jury, and came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 2nd day of December, 1888.

Aylesworth, for the appellants.

Bain, Q.C., for the respondent.

December 22nd, 1888. The judgment of the Court was delivered by

OSLER J.A. :—

Assuming that the defendants were guilty of negligence in not sounding the whistle or ringing the bell as the train approached the crossing, it was, nevertheless, incumbent on the plaintiff to prove that it was this negligence which caused the injury he complains of.

The facts appear to be that the plaintiff was driving homewards on a fine still moonlight night, and was approaching the crossing in question from the south. His home was about three miles further on, and he was familiar with the crossing, and knew that a train might be expected to pass about that time, from the west. He was sitting sideways in his waggon facing the east. The road rises in a gentle slope to the railway track, which is visible from a point halfway up the incline for a distance

of about 300 feet west of the crossing, the view of course increasing the nearer the crossing is approached until the track can be seen for a distance of 800 feet or thereabouts.

Judgment.

OSLER
J. A.

The plaintiff's own account of the way in which he drove up to the track and met with the accident is as follows:—

Q. Do you remember approaching the track that night when you were driving home? A. I understand it thoroughly. Q. Tell us exactly, in your own words, what you were doing and what took place? A. Well, as I approached the track, I went up there just as carelessly and just as simply as I ever approached anything. Q. What do you mean by carelessly and simply? A. Without any fear, I mean. Q. Did you look? A. *Well, I didn't*; I was not—my attention wasn't arrested to any fact other than just simply allowing my going right along the way I always did. Q. As you approached the track did you or did you not look? A. Why, certainly I looked; it would be surprising if I didn't look. Q. Did you see any train? A. No. Q. At what rate were you travelling? A. The horses were *walking up* the approach there right up to the track. Q. It is up hill as you approach the track there? A. Yes, it is up hill all the way. Q. Where were you when you saw the train? A. I was just within about between time and eternity when the thing hit, and that's the last I heard of it. Q. Where were your horses? A. Right on the track. Q. Did you see the train then? A. *I didn't see till I tried to jog them backwards. I never seen the train till they were right on to me.* Q. How far was the train when you first saw it? A. Ten feet; well, it might be a rod or two, probably. Q. You jogged along when you left Raglan; what sort of a seat had you? A. Well, I had a seat that at one time was on top of the box, it was a spring seat, but it had been broken, and the thing was so that it wouldn't sit up any way, and I *pulled the thing off and put it in lengthways in the bottom of the waggon.* Q. Which way did it face, toward the off horse or the nigh horse? A. The off horse. Q. So that if you jogged along your back would be towards the west—towards the way the train came? A. Yes. Q. Did you expect the train or not? A. Well, I didn't know the time to a few minutes. Q. When you left Raglan did you think about the train? A. No. Q. Did you think about the train between the time you left Raglan and the time of the accident? A. No. Q. You were not looking out for

Judgment.

OSLER
J.A.

bells? A. *Well, I knew I was going near a train.* Q. Could you see the headlight? A. *Couldn't see anything; it was a beautiful night.* Q. Moonlight? A. Yes. Q. Did you see the headlight—the glare of it shining? A. I couldn't say. That's not what startled me. Q. Can you say now whether you saw that or not? A. No, I would not say anything about that. I would say I never seen it. Q. The first thing you knew was a crash? A. The first thing that I knew was a little timidity, and I said "Whoa!" and I thought I would make a gallant escape. Q. What caused the little timidity? A. It was the suddenness of the approach, and I thought I would clear myself if possible. Q. And you instinctively yelled "Whoa!" and pulled the horses back? A. Yes. Q. Up to that time you did not turn your head? A. Oh, yes, I did; what's the use of talking that way? *The first I knew was the horses was on the track. I looked around and saw this engine right upon me.* Q. Had you looked before that? A. No, I hadn't; I never seen it before, nor never had any cause to look. Q. Were you singing as you went along—whistling? A. I was humming. Q. Humming a tune to yourself? A. Yes. Q. Were the horses going on a walk or a trot? A. Walking. They were right on the approach.

* * * * *

Q. Was the waggon on the track at all—the fore wheel of the waggon, did it go as far as the iron rail? A. I don't think it did; no. Q. *Do you think either of the horses stepped over the iron rail?* A. *They were both on the track.* Q. Does that mean that their front feet had stepped across the iron rail? A. Yes, but that was as far as they went.

The train was going at a speed of about thirty miles an hour on a heavy up grade, in consequence of which the exhaust or escaping steam was "very heavy and sharp, making a loud report," as one of the witnesses described it. One of the plaintiff's witnesses heard this at the distance of half a mile, "as plain as if he was beside it." Others heard the rumble of the train at a still greater distance.

There was the usual discrepancy in the evidence as to the sounding of the whistle and ringing the bell. The learned Judge by whom the case was tried, without a jury, entered judgment for the plaintiff, finding that the injury

was caused by the negligence of the defendants, and that there was no contributory negligence on the plaintiff's part. The question we have to decide is whether these findings are justified by the evidence.

Judgment.

OSLER
J.A.

There was some slight difference of opinion between the witnesses as to the rate at which the train was going and the distance it could be seen from, or while approaching the crossing. In the absence of any finding or expression of opinion by the learned Judge on these points they should be taken to be as I have stated them.

Our principal difficulty arises from the learned Judge's finding on the question of contributory negligence.

In the case of *Wanless v. The North Eastern R. W. Co.*, L. R. 6 Q. B. 481, 7 H. L. 12, it appeared that the gates on the down side of the defendants' line being open the plaintiff entered on the railway grounds at a time when the train on the up side was passing, intending to cross as soon as it had passed. While there, another train on the down side, which he could have seen if he had looked, knocked him down and injured him. In an action against the company for negligence it was held that there was some evidence for the jury inasmuch as the statutory duty of the defendants was to keep the gates closed when trains were approaching, and the fact of their being open on the down side was an intimation to the plaintiff that the down line was safe. The question whether the plaintiff had been guilty of contributory negligence was not raised. Kelly, C.B., observed that the evidence shewed that if the plaintiff before, or even after he had entered on the railway, had looked on either side of him as far as he could, he would have been enabled to see that the train which inflicted the injury was about to pass along the railway, and so could have avoided the accident; He adds "I am far from saying that these circumstances were not evidence of contributory negligence; for I cannot say that any one crossing a railway, though it might have been intimated to him that he may cross in safety, still, when he is upon the railway, ought not to look upon one side and upon the other, to see

Judgment.

OSLER
A.

whether a train is approaching. But," he adds "we are not called upon to determine any question of contributory negligence."

That question does arise here, and conceding that there was evidence of negligence on the part of the defendants in omitting to give the statutory warning, we must nevertheless see whether the plaintiff could not, by the exercise of reasonable care have avoided the consequence of the defendants' want of it. I see nothing to the contrary of this actually decided in the case of *Peart v. Grand Trunk R. W. Co.*, 10 A. R. 191, and it accords with what has been determined in *Johnston v. Northern R. W. Co.*, 34 U. C. R. 432. See also *Miller v. Grand Trunk R. W. Co.*, 25 C. P. 389, and *Boggs v. Great Western R. W. Co.*, 23 C. P. 573.

Now, I certainly do not mean to lay it down that it is the duty of a traveller on approaching a railway crossing to stop, and to get out of his vehicle and examine the line before crossing it. If that was the law, he could hardly ever cross except at his own risk, for by the time he had made one examination and was ready to proceed it would be said he ought not to cross until he had made another, and so *ad infinitum*. But I think he is bound to use such faculties of sight and hearing as he may be possessed of, and when he knows he is approaching a crossing and the line is in view and there is nothing to prevent him from seeing and hearing a train if he looks for it, he ought not to attempt to cross the track in front of it merely because the warning required by law has not been given. The defendants no doubt in a case like that assume the onus of making out that there was contributory negligence, and this is a question to be determined by the judge or jury, as the case may be, upon a consideration of all the surrounding circumstances.

Facts may appear tending to shew that the plaintiff was surprised or thrown off his guard, or was in other respects at a disadvantage, and that though he acted imprudently, there was some excuse for what he did. Each case depends upon its own circumstances, and these, even where the

defendants' negligence consists in the breach of some statutory duty, may vary all the way from absolute recklessness on the part of the persons injured—his own folly and not the defendants' negligence causing the loss—to a case where there is evidence on both sides of the question, whether the loss is attributable to the defendants' negligence, or the plaintiff's own want of care in avoiding it.

Judgment.

OSLER
J. A.

If in the plaintiff's favour we assume this case to be one of the latter class, because the more precise evidence of the distance from which the train could be seen from the road, came from the defendants' witnesses, and because the accident happened after night-fall, it nevertheless appears to me that the learned Judge should have held that the plaintiff's own negligence here so materially or directly contributed to his injury as to disentitle him to recover. To shew why this is so is almost to repeat the evidence already stated. He knew that he was approaching a railway crossing, and that a train might be expected to pass about that time. He sat in his waggon facing in the direction opposite to that from which the train would come. The night was clear and still. He drove up slowly to the crossing, the horses just setting their feet over the rail before the collision occurred; yet up to the moment before it, he had neither looked nor listened for the train. It hardly admits of a doubt that if he had done so while he had the opportunity, he would have both seen and heard it, and that with his horses going at a walk and under control, he could have turned them aside before reaching the line.

No circumstances of surprise or embarrassment are proved, and the case is one in which to adopt the language of Lord Halsbury in *Wakelin v. London & South Western R. W. Co.*, 12 App. Cas. 41, it may almost be said that the horses ran against the engine, rather than that the engine ran down the horses. The time which elapsed between the moment when the train came in sight, and the collision, was no doubt brief. And a very slight difference in the facts might have warranted the plaintiff's conduct in being

Judgment.

OSLER
J.A.

treated as excusable imprudence, but on his own shewing there was such an absolute want of common reasonable care on his part as to admit of no other conclusion than that the injury was the result of his own contributory negligence.

The cases of *Davey v. London and South Western R. W. Co.*, 12 Q. B. D. 70, 77; *Commissioner for Railways v. Brown*, 13 App. Cas. 133, may be referred to.

I think the appeal should be allowed.

Appeal allowed with costs.

MCLEAN V. BROWN.

Sale of goods—Condition in contract—Refusal to accept—Action for deposit and damages.

THIS was an appeal from the judgment of the Divisional Court of the Chancery Division, reported 15 O. R. 313, and came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.) on the 10th day of January, 1889.

Osler, Q. C., for the appellant.

Aylesworth, for the respondent.

March 5th, 1889.—The Court being equally divided in opinion, the appeal was dismissed with costs.

Per HAGARTY, C. J. O., and OSLER, J. A.—The stipulation as to consignment was a condition the breach of which justified the refusal to accept the lambs.

Per BURTON and MACLENNAN, JJ.A.—This stipulation was merely collateral to the contract, because the contract was with reference to specific goods.

RE McDONAGH V. JEPHSON.

Creditors' Relief Act—Executions against three—Seizure and sale of joint or partnership property of two—Mode of distribution of proceeds.

The Creditors' Relief Act is merely intended to abolish priority among execution creditors of the same class and not to alter the legal effect of the executions themselves, or to effect a distribution of separate and partnership assets in the manner in which such assets are administered in bankruptcy.

There were in the sheriff's hands executions: (1) against R. alone; (2) against R., J. J., and G. J., on a joint note given by them for the price of a horse, J. J. being merely a surety for R. and G. J., who bought the horse as partnership property; (3) against G. J. and R. on a joint note given by them for the price of a threshing machine purchased for the purpose of being used in another partnership business carried on by them quite distinct from that partnership to which the horse belonged; and (4) against G. J. and R. on a joint note in which R. was surety only for G. J. The horse was seized and sold.

Held, BURTON, J. A., dissenting, that under an execution against three, the joint or partnership property of two may be levied, and that the proceeds of this sale were distributable ratably among the executions, (2), (3), and (4).

Per BURTON, J. A. The proceeds of the sale should be applied in satisfaction of execution (3) alone, the property sold being the joint property of the persons liable under that execution.

Proceedings against partnership property under a separate execution against one of the partners considered.

THIS was an appeal by Sawyer & Co. from the decision Statement. of his Honour Judge Toms, Judge of the County Court of the County of Huron, on an appeal to him by the respondent McDonagh from the scheme of distribution prepared by the sheriff of that county in the matter of John Jephons, George Jephson, and Henry J. Riddel, under the Creditors' Relief Act.

The principal question involved was the proper mode of distribution of the proceeds of sale of property belonging to two of three judgment debtors, one execution being against the three and the others against two of them only.

The appeal came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ. A.) on the 11th day of January, 1889.

Moss, Q.C., and James Chisholm, for the appellants.

S. H. Blake, Q.C., for the respondent.

Judgment. March 5th, 1889. HAGARTY C.J.O. :—

HAGARTY
C.J.O.

I am of the opinion that we must decide on the effect of the executions in this case, on the principles of the ordinary law, and not as if the estates were being administered in bankruptcy. The Legislature has not given any special direction on the point, and no formal bankruptcy proceedings are, or in the present state of the law can be, pending.

We have then to consider the effect of the execution on a judgment against three persons, two of whom are co-partners and owners of partnership property.

I am of opinion that the goods of each defendant separately, or of the three jointly, or of any two of them, are exigible under the writ. If any other person were interested as a co-partner or joint tenant of the chattels of the partnership the case would be wholly different. His interest could not be touched. It remains unassailable under the execution. The sheriff cannot manually seize the goods of three on an execution against one or two of them, but can only sell the separate interest, the value of which depends on the actual interest of the execution defendant after taking the accounts, and if a subsequent execution issue against all the co-partners it takes precedence of the separate execution.

In our case the execution attaches on all the goods, of all or any of the defendants, in which no other person has an interest as owner. I think the whole question is as to the actual ownership of the chattels seized, and they are all exigible if no title exist therein in any person not named in the writ. It is said that this is a possible infringement of the rights of creditors of the firm. I do not so view it.

Creditors, as has been often held from *Ex parte Ruffin*, 6 Ves. 119, downwards, have no lien on the partnership effects in a case like that before us. As Lord Eldon said: "The equity is not that of the joint creditors, but that of the partners with regard to each other, that operates to the payment of the partnership debts. * * They had power of suing and by process creating a demand that would directly attach upon the partnership effects."

See also *Ex parte Williams*, 11 Ves. 3, discussed in *Judgment.*
Kendall v. Hamilton, 4 App. Cas. 504 at p. 517. HAGARTY

I think the possible existence of any such creditors or their claims can in no way affect the right to seize every thing which belongs altogether to all or any one or two or more of the defendants named in the writ. The true point seems to me to be wholly as to the ownership of the property seized, and not as to any supposed rights of creditors or others as to its disposition. C.J.O.

When the sheriff is commanded to levy and make, &c., of the goods and chattels of A, B and C, the legal meaning is, as I hold, of them, or of any, or other, or one, or more of them.

In *Jones v. Clayton*, 4 M. & S. 349, it was held that an allegation that A and B had goods and chattels in the sheriff's bailiwick meant in law that both or either of them had goods and chattels.

What could the sheriff truthfully return on such an execution as this? Could he return *nulla bona* if two defendants had the exclusive title to chattels in his bailiwick? He does not know, and I think he need not enquire whether any creditors existed in their partnership business. The latter can only assert their claim by legal proceedings. Unless the fact that the three execution defendants had no joint property would excuse him he would have no defence.

It is clear, however, that in such a writ he would not be confined to property owned jointly by all the defendants, Lindley on Partnership, 5th ed. p. 298.

Although the writ of execution on a joint judgment must be joint in form, it may be levied upon all or any one or more of the persons named in it, for each is liable to the judgment creditor for the whole, and not for a proportionate part, of the sum for which judgment is obtained.

The consequence of this is, that the sheriff may execute against several partners jointly, either on their joint property, or on the separate property of any one or more of them, or both on their joint and on their respective separate

Judgment.

HAGARTY

C.J.O.

properties, and so long as there is any property of the partners or any of them, a return of *nulla bona* is improper.

In Lindley on Partnership, 5th ed., pp. 110-111, it is said the legal notion of a firm is not recognized by lawyers as distinct from the members composing it; citing James, L. J., in *Ex parte Corbett*, 14 Ch. D. 126: "No such thing as a firm is known to the law;" also citing therefor, *Hoare v. Oriental Bank*, 2 App. Cas. 589.

This case seems to me to shew that in the opinion of the Privy Council, the joint property of a firm is seizable under a *fi. fa.* against the partners for a debt jointly and severally due by them with other defendants.

Proof was there allowed for the debt against the joint estate of the partners, although the debt was not a partnership debt.

The judgment discusses the general questions.

In this view of the law, I consider that the appellants, Sawyer & Co.'s, execution against John and George Jephson and Riddel, bound the property of the two alleged partners, and that they became entitled to ratable distribution under the Creditors' Relief Act, with the other execution creditors of those two defendants, viz., McDonagh the respondent and Headen.

BURTON J. A.:—

This is an appeal from an order made by the County Court Judge of Huron, under the Creditors' Relief Act.

Executions were received by the sheriff against the several defendants named in them in the following order:

1. Patrick Lynn v. John Jephson and H. J. Riddel.
2. C. A. Nairn v. John Jephson and H. J. Riddel.
3. Frank McDonagh (the claimant) v. John Jephson, George Jephson and H. J. Riddel.
4. L. D. Sawyer & Co. v. George Jephson and H. J. Riddel.
5. James Walker v. H. J. Riddel.
6. Randal Graham v. H. J. Riddel.

7. John Headen v. George Jephson and H. J. Riddel, and he adopted a scheme of distribution giving to each creditor, whether joint or several, a ratable proportion of the amount levied.

Judgment.

BURTON

J.A.

This, under any circumstances, was erroneous, whether the horse, which was the subject of the sale, was partnership property, or whether the defendants George Jephson and H. J. Riddel were co-tenants and part owners only.

I apprehend the Creditors' Relief Act was not intended to effect any change in the law as to the administration of joint, or partnership, and separate assets, but was merely intended to do away with priority among execution creditors of the same class, and that the duty of the sheriff remains unaffected as to his liability to pay over the proceeds of the sale of partnership effects to the creditors, or creditor, having executions against those joint effects, but ratably and without priority as between themselves.

The learned Judge was warranted, I think, upon the evidence in finding that the two defendants were partners in the property sold, and he has set aside the scheme of distribution made by the sheriff, and has made an order giving the whole proceeds to the claimant McDonagh, and this appeal is against that decision, the appellants claiming that having an execution against the joint estate they were entitled at least to participate.

If the claimant had succeeded in making out the proposition that creditors who cannot shew that their joint debt has been incurred, in the strict sense of the term, as a partnership transaction, and as arising out of the partnership business, cannot be admitted *pari passu* with the creditors properly so called, of the partnership, he would, perhaps, have somewhat advanced his position, but the Privy Council have held that there is no such distinction in *Hoare v. The Oriental Bank*, 2 App. Cas. 589, so that if there are debts due jointly by members of the firm, though not incurred in the partnership business, they will be taken into account in taking the partnership accounts.

So that even if the purchase from the Sawyers and the

Judgment.

BURTON
J. A.

liability thereby created could be regarded as something outside of the partnership transaction, being a joint liability of the two it must be treated on the same footing as a partnership debt.

What I desire to make clear is this, that whilst such joint creditors can rank and be computed in taking the ordinary partnership accounts, a joint claim against the partners and another cannot be so computed any more than the several debts of each partner.

As I understand the rights of the parties at law, the private estate of each partner is subject both to his private creditors and to the partnership creditors, who have against it precisely the same rights.

But upon the partnership effects the joint creditors have a prior claim, not by virtue of any lien or inherent right or equity in them but in consequence of the equity between the partners that the partnership accounts shall be settled before any separate interest is drawn out, each partner being considered as holding his interest in the joint effects subject to a trust for the partnership creditors and the claims of his co-partner, and only the residue for his own benefit. The joint creditors, therefore, through the medium of the partners and in a derivative and subordinate manner obtain a quasi lien upon the partnership effects. *Waters v. Taylor*, Tudor's L. C. 3rd. ed. 513, at p. 588.

The property, therefore, which the partners have in the partnership effects, is not an absolute property in any definite part, but a qualified property subject to the lien of each to have the joint assets applied as I have pointed out.

These being the rights and interests of the partners, it follows that the creditor's right cannot be more extensive.

There has been from time to time much fluctuation of opinion as to the power and duty of the sheriff on receiving an execution against one member of a firm.

Before Lord Mansfield's time the rule was, that on an execution at law against a partner for his individual debt, the sheriff levied on all the tangible property of the part-

nership, and he sold the undivided share of the partner in a specific portion of the property, and the purchaser became tenant in common with the other partners in that property without reference to the partnership accounts.

Judgment.

J.A.
BURTON

There was a vast inconvenience and uncertainty, if not injustice, in that practice, for it was impossible to know what was the value, if any, of the debtor's interest in the partnership until a liquidation of the partnership accounts. Lord Mansfield undertook to correct the practice upon equity principles, and it became the doctrine that the creditor could not take an undivided moiety of the partnership effects for the separate debt of the partners without having regard to the partnership accounts. He could only take the interest of the partner in the partnership effects, and that interest was only the share remaining after the partnership debts were settled and the accounts adjusted, and might be nothing; and for a short time this was carried into practice by taking the accounts in a court of law. Lord Eldon held, however, in *Waters v. Taylor*, 2 V. & B. 299, that the courts of law had no such powers, and since that time it has always been the practice to take the account in equity.

The former practice of seizing a moiety has been completely exploded, and the interest of the debtor, that is, the share after payment of the partnership debts is all that can be sold.

This practice is, however, almost as inconvenient and unjust in the opposite direction as when a portion of the assets was actually sold, as a purchaser has no means of ascertaining the value of what he is purchasing. It is in fact just such a description of sale as courts of equity have repeatedly refused to sanction, viz., selling an interest before it is ascertained what is the subject of that sale and purchase; and I imagine that at the present time the proper practice would be for the other partners to obtain an order directing the sheriff to withdraw, and directing the accounts of the partnership to be taken, and the value of

Judgment.

BURTON

J.A.

the debtor's interest ascertained, and the appointment of a receiver.

But if the sheriff does proceed to execute the writ, I apprehend that, as the law is now settled, the purchaser of an interest of one member of a firm in its personal property acquires thereby no right to the possession, which is to remain exclusively with the other partners, the purchaser being only *quasi* tenant in common so far as to entitle him to an account; and even on a sale of the separate interest of the remaining partner, the purchaser could not claim any higher interest than the value of the share purchased after payment of the partnership debts, and the adjustment of the equities of the partners *inter se*, which was all that he bargained for, or the sheriff professed to sell.

The partners would still be entitled for their own protection to remain in possession until some steps were taken by the purchaser for the appointment of a receiver and the taking the accounts.

Upon the sale under both writs the sheriff could not sell the corpus; if he could, let us consider for a moment what might be the result.

A firm say of A. and B., have a partnership stock worth \$10,000, but if the firm were wound up it would be insufficient to pay the partnership debts, and the interest of each of the partners therefore is nil. If the property could be sold under these executions the result would be that the individual debts of the partners would, to the extent of these judgments, be satisfied, whilst the joint creditors would lose their debts, or be compelled to resort to the individuals who composed the firm, one of whom may have derived but a small benefit from the sale, but would be liable to make good the firm's debts. Or to take a further illustration: the stock being of the value of \$10,000, in which the ultimate interest of A. would be nil, the partnership debts \$8,000, the interest of B. say \$2,000, an execution issues against A for \$9,000, against B for \$1,000. The whole property is sold, and yields sufficient to pay both executions. The result is that A's private debt (his share

in the partnership being nil) is paid off. The joint creditors lose their claim upon the joint effects, and B, who is solvent, not only loses his interest in the joint effects over and above the \$1,000 paid, but is exposed to, and bound to, make good the whole of the partnership debts.

Judgment.

BURTON
J.A.

The case of *Young v. Keighly*, 15 Ves. 557, shews that an assignment by one partner of his interest in the partnership for his separate debt will be subject to the payment of the partnership debts.

It is clear, then, that an execution creditor cannot be in a better position than the debtor himself.

If authority were wanting for what seems to me so clear a proposition I refer to *Taylor v. Fields*, 4 Ves. 396; *Fox v. Hanbury*, Cowp. 445.

Now a creditor who has obtained a judgment against several persons jointly may seize in execution the joint property of all the debtors and the separate property of each, but not the partnership effects of any two or more of them: *Ex parte Christie*, Mont. & Bl. 352.

The judgment debtors may in one sense be said to be jointly and severally liable, as, under an execution against the whole, the separate interests of each can be seized. This does not, however, render the creditor a joint and several creditor, for his judgment is joint and the remedies open to him do not alter the character of the right to enforce which they are given. See Lindley on Partnership, 5th ed. p. 701, note (k).

In 2 Rol. Abr., 468, it is laid down, that if A. B. and C. bind themselves jointly and severally in a statute or recognizance the conusee may have execution against one singly or against all of them together, but not against two only, the liability being joint or several, but execution against two, it is said, is neither one nor the other.

I may here again refer to the judgment of Sir James Colvile in *Hoare v. The Oriental Bank*, 2 App. Cas. 589, to show that although the bond in that case bound the obligors jointly and severally, and any two or more of

Judgment.

BURTON

J.A.

them jointly, whenever it passed into judgment it became a joint liability only.

It follows then that whatever the nature of the original obligation, if it passes into judgment, the original obligation is changed into a matter of record. If for instance the original debt were a partnership debt, but the holder of it has obtained a judgment against one only of the partners (except in cases provided for by statute) that judgment creditor could not seize the partnership effects, but such interest only as he would be entitled to in the surplus.

To apply the law, as I have endeavoured to define it, to the present case. We have now to deal only with two claims, that of McDonagh and that of the appellants:

Whatever may have been the nature of McDonagh's claim, all we know of it now is, that we find it in the shape of a joint judgment against three persons, and he is entitled under the judgment to seize not only any property in which the three are jointly interested, but any separate property that each of them is entitled to; but I deny that under such an execution the partnership effects of any two, who constitute a firm, can be seized or sold. To do so might be to allow that property to be sold not for the payment of the partnership debts, but for the individual debts of one or the other of the judgment debtors. It may be that in this particular case, it may operate somewhat unjustly, as the note sued on was given in payment of the very property the subject of this enquiry; but that cannot affect the general principle. All that we have before us is a joint judgment—it may be for aught we can know on a several note of John Jephson, George Jephson and H. J. Riddel—the plaintiff has converted it into a joint claim against the three, for which he has judgment and execution.

If any authority can be found to show that such a judgment can be treated not only as a joint judgment against the three, but also as a judgment against any two, so as to constitute it in effect a judgment against the firm, I admit that I am entirely wrong, but I am satisfied no such author-

ity can be found—it is quite against principle—and if it merely authorizes the sale of the joint property of the three and the separate property of each, we are brought back to the original proposition that the corpus cannot be sold.

Judgment.

BURTON
J. A.

I think a fair way of testing the question of the right under a joint judgment and execution to seize and sell any thing more than the joint assets of the whole, and the separate property of each, is to take the case of a separate execution against the partnership, say of B and C, and the appointment of a receiver and the taking of the partnership accounts. In taking such accounts can it be seriously contended that a joint creditor of A, B, and C, could be entitled to claim as a creditor in competition with the creditors of B and C. If he could not do so in taking those accounts, how can he be allowed under his joint execution to sell the whole partnership effects to the exclusion of the actual creditors of the firm.

It would be a strange result if in the one case, which is clearly open to the partners, of having the accounts taken and a receiver appointed, the joint claim of the judgment creditor would be excluded as not being a partnership debt, and that he should notwithstanding, if that course was not resorted to, be entitled to sell the partnership assets for a debt for which the partners as partners were not liable.

I think, therefore, that the proper order for the Judge to have made was that the whole proceeds of the sale, or so much as may be necessary to satisfy it, should have been applied to the appellants' execution, but as this point was not taken in the reasons of appeal, and secures to them a much greater advantage than they seem to have anticipated, I think we may fairly allow the appeal without costs, and direct the order to be amended by directing the proceeds of the sale to be paid over to the appellants to the extent of their execution.

The 43rd section was, I think, introduced *ex abundanti cautela* to guard against any supposition that the Act was intended to take the place of an insolvent Act or to be one dealing with insolvency matters, and is a mere declaration

Judgment.

BURTON

J. A.

to that effect, and does not in any way affect the construction to be placed upon it, which, as I have said, was merely to abolish priorities amongst the same class of execution creditors.

OSLER J. A. :—

The fund which is in the sheriff's hands to be distributed consists of the proceeds of the sale of a horse which belonged to George Jephson and H. J. Riddel, either as partners or co-owners, bought by them from McDonagh the respondent for the purpose of being employed, as it was employed, in business which they carried on with it in partnership, and the learned Judge has found as a fact that it was partnership property.

There are seven executions in the sheriff's hands. Four of these for the purposes of this case may be said to be against Riddel alone, though in two or three of these there is also a co-defendant. The three others are those of (1) McDonagh (the respondent) against John Jephson, George Jephson, and H. J. Riddel, on a judgment recovered on a joint note given by them for the price of the horse, the defendant John Jephson being merely a surety for the other two ; (2) J. D. Sawyer & Co., (the appellants), against George Jephson, and H. J. Riddel, on a judgment recovered upon their joint note for the price of a threshing machine sold by Sawyer to them for the purpose of being used in another partnership business carried on by them, quite distinct from that partnership to which the horse belonged and (3) John Headen against George Jephson and H. J. Riddel on a judgment recovered upon a similar note on which Riddel was surety only for Jephson.

The sheriff prepared a scheme distributing the fund ratably among all the execution creditors.

The respondent McDonagh contested the proposed scheme on the ground that his judgment was the only one which had been recovered in respect of a partnership debt of George Jephson and H. J. Riddel (though in fact recovered

against the partners and their surety John Jephson), and that the fund being the proceeds of partnership property was applicable to satisfy that execution in priority to judgments recovered against Jephson and Riddel as mere joint debtors, or against H. J. Riddel alone.

Judgment.

OSLER
J.A.

The learned Judge decided in favour of this contention, and ordered that the whole fund, which was not more than sufficient to pay McDonagh's judgment, should be applied upon his execution, to the exclusion of those of all the other creditors.

Sawyer and Company now appeal.

The case may be disposed of without raising any question as to the Creditors' Relief Act being *ultra vires* the Provincial Legislature, although the learned Judge in the Court below expressed "the decided opinion that the legislature intended that a debtor's estate in Ontario should be divided amongst his creditors in the same way as if a general bankrupt law were in force, and the debtor's estate were being wound up under it." If the case in its peculiar circumstances depended upon the Act being applied and worked out upon that principle (and neither of the parties has so contended), I should require further argument and more time for consideration.

The question, however, is not necessarily involved in the determination of the appeal.

The professed object of the Act is merely to abolish priorities among execution creditors, and we need not consider that the former law is interfered with or altered further than is necessary to give effect to that intention. We are still dealing with legal executions and the distribution among execution creditors of the proceeds of property which may be seized and sold thereunder.

Assuming that the horse was the partnership property of George Jephson and H. J. Riddel in the particular partnership business they carried on with it, there were, as I understand the law, three executions under which it could have been actually seized and sold, and a title to the corpus assigned to a purchaser. These were the executions of

Judgment.

OSLER
J.A.

McDonagh, Sawyer & Co., and Headen. McDonagh was the only creditor of the partnership to which the horse belonged; but as regards the right of all to share in the proceeds, dealing, as I have said we are with execution creditors, it is unnecessary to consider whether any of the judgments was recovered in respect of a partnership debt, for as creditors merely, they had no lien on the partnership property, and "a judgment against a firm of partners is nothing else than a judgment against the partners as joint debtors, and is treated like any other judgment of that nature;" *Pollock on Partnership*, 4th ed., p. 103; *Hoare v. Oriental Bank*, 2 App. Cas. 589. In reading that case, it is to be borne in mind that much of what is said as to the rights of judgment creditors relates to their right of proof against the partnership estate in bankruptcy, and not to their rights as execution creditors. See especially at p. 597, where the distinction is recognized.

But it is said, I understand, although the point was not argued at the bar, that the property in question, whether the partnership property or merely the joint property of the two judgment debtors Geo. Jephson and Riddel, could not have been levied under the execution of McDonagh, which was an execution against three, on a judgment jointly recovered against John Jephson, George Jephson and H. J. Riddel.

A sheriff would, in my opinion, be not well advised who, having a *fi. fa.* goods against three or more, should make a return of *nulla bona*, there being property in his bailiwick belonging to two of the defendants either as co-owners or as partners. For a judgment cannot be compared, as regards the right to enforce it by execution, to a joint and several voluntary obligation or contract of the parties, which the holder may enforce against one or against all at his option, but not against more than one, and less than all. Execution issues upon a judgment, not according to the tenor and effect of the obligation upon which it may have been recovered, nor as if it were a joint and several obligation. It cannot be issued at the creditor's option

against one, or against all, or (all the defendants being alive) against any number less than all, but must strictly pursue the tenor of the judgment.

Judgment.

OSLER
J.A.

"The writ must strictly pursue the judgment and be warranted by it or it will be void," Ch. Pr. 5th ed. 474, 458, Tidd's Pr. 9th ed. 998.

"If the action be against two or more and judgment recovered against all, execution must go against all, and not against part only, and the same kind of execution must go against all." 1 Sellon's Pr. 517, *Clark v. Clement*, 6 T. R. 525.

"If a man has judgment in an assize against any three for lands and damages, he cannot sue execution by *capias* against one only, for the damages, but the *capias* ought to be against all, for the execution ought to ensue the nature of the original"; Bac. Abr. Tit. Execution G (1).

In Bingham on Executions, p. 181, it is said: "If A, B, and C bind themselves jointly and severally by a *statute* or *recognizance*, the conusee may have execution (thereon) against one singly, or against all of them together, but not against two only; for the execution must pursue the statute or recognizance which is joint or several, but execution against two is neither one nor the other."

The distinction is plainly taken between a statute and a judgment, and though the execution must follow the judgment it will nowhere be found that it cannot be levied against the goods or persons of any one, two, or more of the defendants; and with this accords the statement of Lindley, L. J., in the last edition of his book on Partnership, p. 701, note (k.)

Were it otherwise, the consequences might be sufficiently singular, and a judgment creditor of three or four judgment debtors might find himself defeated, although two or three of them were, jointly as partners or otherwise, possessed of abundant property to discharge the debt.

Then as to the other four executions which were practically against Riddel alone. Under these the sheriff could not have sold the whole corpus of the goods, but only Rid-

Judgment.

OSLER
J.A.

del's share or interest in them. "Under a *fi. fa.* against one of two partners the sheriff may seize and sell the defendant's undivided moiety in them, in which case the purchaser will be tenant in common with the other partner:" Ch. Pr. 5th ed. 486; Tidd's Pr. 9th ed. 1007; *Eddie v. Davidson*, 2 Dougl. 650. The subject is one which Lindley, L. J., thus discusses as regards the duty of the sheriff and the interest of the purchaser, in the recent case of *Helmore v. Smith*, 35 Ch. D. 436, at p. 447: [The learned Judge read the passage quoted by MacLennan, J. A., p. 126.]

See also *Whetham v. Davey*, 30 Ch. D. 574, at p. 579, per North, J., whose observations must, however be taken to be qualified by those of Lindley, L. J., already cited.

The question was considered in this Court in the case of *Ovens v. Bull*, 1 A. R. 62; and the case of *Sanborn v. Royce*, 132 Mass. 594, may also be referred to.

Here it is plain that no part of the proceeds of the sale can be attributed to Riddel's interest in the property, for the whole did not produce enough to satisfy the joint executions against it, and it would be only the surplus which remained after satisfying them that would be applicable to the separate execution against either of the partners. *Taylor v. Jarvis*, 14 U. C. R. 128. Burns, J., in that case said that if it were the case of an application to divide the proceeds between different creditors, upon executions all coming to the sheriff's hands at the same time, it might be right to make enquiry as to facts which would enable the Court to deal with the proceeds in an equitable manner; a course which might have been taken here if the facts admitted of it; which they do not, the interest of Riddel being shewn to be worthless.

Upon the whole it seems to me that the appeal should be allowed, and that it should be declared that the creditors entitled to share in the fund are the appellants, the respondent, and Headen, to the exclusion of the other four. The respondent must pay the costs of this appeal.

MACLENNAN J. A. :—

Judgment.

MACLENNAN
J.A.

The question in this appeal arises under the Creditors' Relief Act, R. S. O. ch. 65.

The respondent McDonagh has an execution in the hands of the sheriff of Huron against three persons, George Jephson, John Jephson, and H. J. Riddel. The judgment was recovered on a promissory note made by George Jephson and H. J. Riddel, endorsed by John Jephson as surety. The note was given for the price of a horse bought from McDonagh by George Jephson and Riddel either as tenants in common or as partners.

The appellants, Sawyer & Co., have an execution against George Jephson and H. J. Riddel obtained for the price of a threshing machine sold to them.

The money in the sheriff's hands for distribution is the proceeds of the sale of the horse seized under the executions and sold by him.

The sheriff prepared his schedule on the principle that both McDonagh and Sawyer & Co. were entitled to a share of the money in his hands. McDonagh appealed to the learned Judge of the County Court against the sheriff's scheme of distribution, and the learned Judge allowed the appeal. He held that the horse belonged to the two debtors, George Jephson and H. J. Riddel, as partners, and "that the Legislature intended that a debtor's estate in Ontario should be divided amongst his creditors in the same way as if a general bankrupt law were in force and the debtor's estate were being wound up under it."

On this principle he ordered that McDonagh should be paid his debt in full as a creditor of the partnership, and Sawyer & Co. bring this appeal against that order.

After a careful consideration of the Act I am unable to discover in it the intention which the judgment appealed from attributes to it. I think the object of the Act is expressed in its title, namely, to abolish priority among execution creditors, and that in other respects their rights against the goods of the debtor remain as they were before.

Judgment. That being so the only question is whether, if the horse was partnership property, that makes any difference.

MACLENNAN
J.A.

In my judgment it makes no difference whatever. It has long been clear law that the creditors of a partnership firm have no lien on the partnership goods any more than in the case of any other debtor and creditor: *Ex parte Williams*, 11 Ves. 3. If that is so it follows that the effect of a judgment obtained by a creditor of the firm is exactly the same as a judgment obtained against the same persons for a claim which is not a partnership claim.

A judgment against a number of persons may be enforced against any goods belonging to them all jointly, or to any one of them individually, and also against goods belonging to any two or more of them jointly, and that wholly irrespective of the nature of the cause of action.

In the present case the horse might have been seized and sold and the proceeds applied in satisfaction of either of the two executions if it had stood alone, and so they must now be divided under the Act proportionally between them.

I think it is quite immaterial whether the horse was partnership property, or was held in common. For the purposes of the execution, all that is essential is, that there shall be an execution against all the owners, whether they be joint tenants, or tenants in common, or partners. Under such an execution, the sheriff can take and sell the very goods themselves, and not merely an interest in them, and may apply the proceeds on any execution against the owners.

The title of the partners to the goods of the firm is exactly the same as the title of any other person where goods are owned by more than one person; the only difference being, that in most cases of partnership, it is not possible to ascertain the share or proportion owned by each without winding up the business, which may involve an action in the High Court for the purpose, while in other cases the shares are owned by the parties in defined and known proportions.

The same question that has arisen here, might have arisen independently of the Creditors Relief Act, in the case, which might very well happen, of two executions being placed in the sheriff's hands at the same moment. In such a case the sheriff would have been bound to divide the proceeds of the sale proportionally.

Judgment.
MACLENNAN
J.A.

My learned brother Burton thinks that under an execution against several, say A, B, and C, the sheriff can take goods belonging to all three, or to any one, but not goods belonging to any two, as to A and B alone, to A and C alone, or to B and C alone. I am unable to agree in this view. I think he may take the goods of all or of any one, or of any combination of the defendants, for the reason that all the property of each is liable to pay the whole debt; and the property of any two is, when analysed or resolved, no more than property of each of those two.

It must be borne in mind that the present question concerns legal rights and interests, and we are not concerned with what might or ought to be done if partnership assets were being administered in equity, or were in the hands of a receiver; or were being dealt with in bankruptcy. The question is merely as to the power and duty of the sheriff under a legal execution, sued out upon a legal judgment, with reference to goods, the legal and equitable property in which is vested jointly in two of the execution debtors.

In 4 Comyn's Dig. Tit. Execution, (c. 4) p. 223, it is said: "And if there are joint partners and execution against one, the sheriff can take only his share; can sell only his part, though he ought to seize the whole."

In *Holmes v. Mentze*, 4 A. & E. 127, at p. 131, Lord Denman, said: "The sheriff must sell the share of the defendant partner and make the purchaser tenant in common with the other partners, and the purchaser must do the best he can to ascertain what interest there is."

In *Chapman v. Koops*, 3 B. & P. 289, Lord Alvanley says: "By the law of England, the creditor of any one partner may take in execution that partner's interest in all the tangible property of the partnership, and will thereby become a tenant in common with the other partners."

Judgment. In *Johnson v. Evans*, 7 M. & G. 240, at p. 250, Tindal, C.
MACLENNAN J., quotes these authorities with approval; and in the lat-
J.A. est case on the subject, *Helmore v. Smith*, 35 Ch. D. 436, the same doctrine is recognized; and at p. 447, Lindley L. J., says: "Let us consider what the sheriff could do under that *fi. fa.* (that is, a *fi. fa.* against one of two partners). He could seize all such of the assets of the firm as are seizable under a *fi. fa.*, but he could not seize book debts or good-will. The *fi. fa.* does not touch such things; and it is a mistake, and a very serious mistake, to suppose that when the sheriff, under a separate execution against one of several partners, seizes the partnership goods and sells the share and interest of the execution debtor in those goods, the sheriff can, or does in practice, sell the whole of the execution debtor's interest in the partnership. Such a case is conceivable, but in practice it never arises, because there are always in practice assets which cannot be reached by a *fi. fa.* What the sheriff has got to sell is not the share and interest of the execution debtor in the partnership, but the share and interest of the execution debtor in such of the chattels of the partnership as are seizable under a *fi. fa.* The unfortunate purchaser from the sheriff, has to find out what he has really had assigned to him, and that he can only do by a partnership account. There is no other method of proceeding."

In the 5th edition of Lindley on Partnership, (1888) at p. 357-8, the author says: "It was finally settled in conformity with the older cases that the sheriff's duty was, and it still is, to seize the whole of the partnership effects (seizable under a *fi. fa.*), or so much of them as may be requisite, and to sell the undivided share of the debtor partner therein, without reference to the state of the accounts as between him and his co-partners. The sheriff, having seized the property of the firm, proceeds to sell the interest of the judgment debtor in the chattels seized, and to assign the same to the purchaser. If the purchaser is a stranger unconnected with the firm,

he acquires for his own benefit all the judgment debtor's interest in the property comprised in the bill of sale, and becomes, as regards such property, tenant in common with the judgment debtor's co-partners."

Judgment.
MAOLENNAN
J.A

I take it to be clearly established by these authorities that the sheriff may seize and sell the interest of one partner in the seizable chattels of the firm, and that the purchaser thereby becomes a tenant in common with the other partner or partners. The legal property and interest in the goods, which before was in the debtor, is thereby vested in the purchaser.

Now it is not disputed that under a judgment against several debtors, say three, as in the present case, for the sake of illustration, every one is liable for the whole debt, and the joint goods of all, and also the separate goods of each, may be seized and sold. The seizure of the joint goods of all may be considered, and perhaps in strictness is, a seizure of the separate interest of each in the goods owned by them jointly; and inasmuch as the sheriff may seize the separate goods of each, so under such an execution he may clearly seize the separate interest of any two in goods owned by those two alone as partners. If the sheriff under an execution against A, can take A's separate goods, and also his individual interest in partnership goods, it follows that under one execution against three, under which it is admitted he may take the separate goods of each, he may also take the share of each in the goods of any partnership firm of which he is a member. Therefore if A and B are in partnership, having partnership goods he may take the share of A, and also the share of B. A and B being both equally liable for the whole execution debt, neither can find fault with the sheriff for selling their interests together, and I am unable to see why the person who buys the interests of both of them from the sheriff, does not get a perfectly good title in law and in equity. If the purchaser of the interest of one, would be tenant in common with the other partner, the purchaser of the interests of both must have the whole property.

Judgment.
MACLENNAN
J.A.

And if it is said that there is some equity which stands in the way of such a sale, or which affects the title of the purchaser, I deny that there is any such equity. It was settled long ago, as already stated, that the creditors of a partnership firm have no lien or equity upon the partnership goods; *Ex parte Williams*, 11 Ves. 3. Therefore, in such a case as the present, any conceivable equity must be that of one or other of the partners. An equity, as I understand it, is a right to apply for relief of some kind to a Court of Equity. What conceivable application could the debtors make in this case, either against the sheriff or against the sheriff's vendee? Their goods have been sold to pay a debt, the whole of which they were both bound to pay, and they might have saved their goods by paying before the sale.

I have never heard of such an equity, nor am I aware of any authority for it.

I observe that in the last edition of Lord Justice Lindley's book on Partnership, already referred to, at p. 701, note (k), that learned Judge says: "A creditor who has obtained a judgment against several persons jointly can levy execution against any one or more of them." Although this statement is in a note, yet it is very important, as the opinion of an eminent Judge who has given a great deal of attention for many years to the law of partnership.

I am of opinion that the appeal should be allowed and with costs.

Appeal allowed with costs.

GOLDIE V. JOHNS.

Assessment and Taxes—Fiscal year—By-law extending time for payment of taxes—Tax sale—Replevin—Sale of safe held under lien agreement—R. S. O. cap. 184, sec. 364.—R. S. O. cap. 193, secs. 53, 122, 123, and 124.

In December, 1886, the plaintiffs sold to one H., who was a tenant of the defendant G. of certain premises in the City of Stratford, a safe under the ordinary lien agreement. Under the lease H. was to pay taxes. In October, 1887, after the first instalment of purchase money had been paid, H. surrendered his lease to G., who took over the chattels of H., (including the safe), at a valuation, and assumed payment of the proportion up to that time of the taxes for 1887. G. then leased the premises to the defendant P. and sold to him the chattels (including the safe.)

The defendant J. was the collector of taxes for the City of Stratford, and the roll for 1887 was delivered to him on the 26th October, 1887.

It was provided by by-laws of the City that all taxes and assessments should be paid by the 31st December in each year and that five per centum should be added for non-payment and collected as if the same had originally been imposed and formed part of such unpaid tax or assessment.

On the 2nd November, 1887, J. served on P. a tax notice showing the amount of taxes and requiring payment of these taxes on or before the 31st December "according to City by-law; after that date 5 cents on the dollar will be added to the above amount."

On the 9th March, 1888, the plaintiffs demanded from the defendants P. and G. possession of the safe, but possession was refused, and on the same day the defendant J., acting under the instructions of the defendant G., issued his warrant to the defendant T. to distrain, and the safe was seized on that day and sold on the 15th March to the defendant G. whose object in buying was to protect P.

No demand for payment of the taxes other than the demand served on the 2nd November, 1887, had been made.

Held, per BURTON and MACLENNAN, JJ.A., that the sale (upon the evidence) was not made in good faith and was void.

Held also, per OSLER, J. A., that as to the collector and bailiff, though not as to the other defendants, the sale was made in good faith and would have protected them if otherwise valid, but that it was bad as to all the defendants on the ground that no demand had been made by the collector after the time fixed by the by-law for payment of the taxes.

Section 364 of the Municipal Act, R. S. O., ch. 184, relates to the period of the fiscal year for which the taxes are imposed and levied, and not to the extension of the time for payment of the yearly taxes which is done by by-law passed under the authority of section 53 of the Assessment Act, R. S. O., ch. 193.

Chamberlain v. Turner, 31 C. P. 460, and *Carson v. Veitch*, 9 O. R. 706, considered.

Judgment of the County Court of the County of Perth affirmed.

THIS was an appeal from the judgment of the County Court of the County of Perth and came on to be heard before this Court (BURTON, OSLER, and MACLENNAN, JJ.A.), on the 14th and 15th days of January, 1889.

Judgment.
MACLENNAN
J.A.

Idington, Q.C., for the appellants.

Aylesworth, for the respondents.

March 5th, 1889. MACLENNAN J.A. :—

The defendant William Gordon is an alderman of the city of Stratford. He is also the proprietor of the Albion Hotel ; the hotel not being managed by Gordon himself, but by tenants. Prior to October, 1887, one Holmwood was Gordon's tenant, and managed the hotel. Holmwood had then in his possession an iron safe which he had agreed to buy from the plaintiffs, by an agreement in writing under which the safe was to remain the property of the plaintiffs until paid for, and only part of the price had then been paid. Prior to October both Gordon and his tenant Holmwood had been duly assessed by the city of Stratford for the hotel property, the one as owner, and the other as tenant. On the 10th of October Gordon had a settlement with his tenant Holmwood, who then gave up possession of the hotel, and a new tenant came in named Putland. In the settlement with Holmwood, Gordon agreed to pay the taxes for which they were both liable, and he bought the iron safe knowing that it was only partly paid for, and he transferred it with other chattels to the new tenant Putland, who had it in his possession from that time until the seizure and sale which afterwards took place.

On the 26th of October, 1887, the collector's roll for that year was placed in the hands of the defendant Johns, the collector of city taxes ; and upon this roll the persons set down as liable to pay the taxes for the Albion Hotel were Gordon and Holmwood, and the amount was about \$130. On the 2nd of November the collector served a *démand* at the Albion Hotel requesting that payment should be made on or before the 31st of December.

The taxes however were not paid, nor was the balance on the safe, and on the 8th of March, 1888, the plaintiffs' agent came to Stratford, informed Putland of the plaintiffs' claim and demanded possession of the safe, which was

refused. Putland referred the plaintiffs' agent to Gordon, to whom on the 9th March, he went, and shewed him the agreement of sale, which he read. Gordon then said he wished to consult his solicitor, and they parted ; later in the day they met again when Gordon said he had seen his lawyer, and he could do nothing as the safe had been seized for taxes. It turns out now that between his two interviews with the plaintiffs' agent, and after reading the sale contract, Gordon went to the collector Johns, and directed him to seize the safe for taxes. Johns at once gave a warrant to the bailiff Tobin, and Tobin seized the safe, but nothing else, and gave notice of sale for the 15th. All this appears to have been done with the greatest promptitude between the two interviews which the plaintiffs' agent had with Gordon. On the 13th the plaintiffs' agent served the collector and his bailiff with notice forbidding the sale.

Judgment.

MACLENNAN

This notice was disregarded, and the bailiff sold the safe on the 15th March, and Gordon became the purchaser at \$70 or thereabouts. This sum, less expenses, was paid by Gordon to the collector, and applied by him towards the taxes, but the remainder of the taxes were still unpaid, and no further effort appeared to have been made to collect them up to the time of the trial of this action on the 29th June.

On the 29th of March, the plaintiffs demanded the safe of Gordon who refused to deliver it; and then the present action was commenced, and the plaintiffs replevied the safe.

The case was tried before the learned Judge of the County Court, who gave judgment for the plaintiffs, and afterwards discharged a rule taken out by the defendants to set the judgment aside.

The defendants now appeal from that judgment, and a number of points were argued before us, upon some of which, in my judgment, it is not necessary to express an opinion.

There is no room for doubt upon the evidence that the safe in question was the plaintiffs' property, and the only

Judgment.

MACLENNAN
J.A.

question is, whether the means adopted by the defendant Gordon to deprive them of it have been successful. I am of opinion that everything that was done here was fraudulent from beginning to end, and of no effect whatever in law or in equity: *Lucas v. Nockells*, 1 Cl. & F. 438, at p. 491. The whole transaction was a dishonest scheme of Gordon's to deprive the plaintiffs of their property. The moment he learned that the plaintiffs' agent was looking after the safe, he induced the collector to come to his assistance, and to seize it, and to go through the form of a sale, but I do not look upon it as the collector's sale. It was Gordon's sale, it was his act from beginning to end. It is not pretended that the collector was thinking of a seizure, or would have made a seizure, but for Gordon's request. He received his orders from Gordon, and lost not a moment in obeying; he seized nothing but this safe, though there were other goods, and though he knew the safe was not sufficient to pay the taxes, and up to the time of the trial he made no effort to collect the remainder. There is no suggestion that there was any danger of the taxes being lost, or that Gordon was not perfectly good for them. Gordon, therefore, cannot be heard to say that this was a sale by the collector in his official capacity, or by the authority of the corporation, or for the purpose of collecting the taxes, or that it was anything else than a seizure and sale by his authority, at his request, and for his purposes. But that is not all. The taxes were Gordon's own debt. He was assessed. He was debtor on the roll. The taxes were in respect of his own property, and by the arrangement between him and Holmwood, he was the person, and the only person, who ought to pay them. What he did therefore was to procure this collector to seize a stranger's goods and to sell them to pay his own debt. This was certainly a remarkable feat, and in my judgment there could hardly be a more dishonest or fraudulent piece of conduct.

We need not consider what the effect of the sale would have been if a third person had, in good faith, bought the safe. We have here to deal with the author and concoctor

of the fraud, for Gordon bought the safe himself. He has the courage to come into a Court of Justice and to contend that his fraudulent scheme was successful, and that he can retain its fruits. In that he is mistaken. I am clearly of opinion that he cannot be heard in a Court of Justice to contend that any title whatever at law or in equity passed to him by a sale brought about as this was. If it could be supposed that anything passed at law, which I do not suppose, the Court could still undo the effects of fraud, and give the plaintiffs the benefit of their equitable rights, with the aid of section 16 of the Judicature Act, which I think is applicable to actions of replevin as well as to other actions.

Judgment.
MACLENNAN
J.A.

If further argument were needed, it is noticeable that the taxes being Gordon's own debt there was no consideration to support a sale of the safe to him. The only consideration was, the payment of \$70 of his own debt which is in effect no consideration whatever.

In my opinion the appeal should be dismissed with costs, and as Gordon has occasioned the litigation, the other defendants should have their own costs, and any they may have to pay the plaintiffs, from him.

BURTON J. A. concurred.

OSLER J. A.:—

It will be convenient first to consider whether the sale for taxes, upon which all the defendants rely, can be upheld. If the collector and his bailiff cannot defend themselves under it, neither can the other two defendants Gordon and Putland. There are other difficulties peculiar to the case of these two defendants, unconnected with the question of the mere regularity of the sale, which may prevent them from asserting title under it even if valid as to the first named defendants.

It appears that the taxes for which the levy was made, were those imposed for the year 1887. The Municipal Act,

Judgment.

OSLER
J.A.

46 Vic. ch. 18, sec. 366, (now R. S. O. 1887, ch. 184, sec. 364), enacts that :

“The taxes imposed for any year shall be considered to have been imposed and to be due on and from the first January of the then current year, and end (*sic*) with the 31st December thereof, unless otherwise expressly provided by the enactment or by-law under which the same are directed to be levied.”

This section, which in its present form is first found in the Assessment Act of 1868, 32 Vic. ch. 36, sec. 18, is awkwardly expressed. The draftsman's intention evidently was—with a large economy of words—to amend the former law by enacting that the taxes should be considered not only to have been imposed for the year commencing 1st January, and ending 31st December, as C.S.U.C. ch. 55, sec. 16, and 16 Vic. ch. 182, sec. 14, provided, but also that they should be considered to have been due on and from the 1st January. One object of the amendment probably was to simplify the mode of ascertaining when taxes could be said to be due for the purpose of selling lands for taxes, and computing the time necessary to elapse before they could be offered for sale, thus removing the objections which invalidated the sales in question in *Ford v. Proudfoot*, 9 Gr. 478 ; *Kelly v. Macklem*, 14 Gr. 29 ; *Connor v. Macpherson*, 18 Gr. 607. The plaintiffs rely on a by-law made, it is contended, in effect under this section.

For what reason or under what circumstances a fiscal year different from that fixed by the Municipal Act may be or is likely to be adopted by a municipal council I am unable to imagine. The section as we now have it, relates, as it did when it appeared in its original shape in 16 Vic. ch. 182, sec. 14, to the yearly taxes, and to the year for which they are considered to be imposed, and it is clear that if the council do adopt a different fiscal year they must, by the very terms of the section, expressly do so by the by-law under the authority of which the taxes are to be levied. The section relates merely to the period of the fiscal year, and not to a postponement of the time for

payment of the taxes of the year, which though due from the commencement of the year are not payable or in arrear until the collector has received his roll, and has taken the necessary steps to enable him to distrain. The word "due" has no relation to the time of payment of the taxes, or to their being in arrear, referring back as it does to a period when they have not even been ascertained.

Judgment.

OSLER
J. A.

The by-law in question in this case for fixing the yearly rates for the year 1887, was passed on the 24th October, 1887. It makes no alteration in the fiscal year, and therefore the taxes to be levied under it are to be considered to have been "due" in and from the first day of January, and to have been imposed for the year then commencing, and ending on the 31st December.

The collector received his roll on the 26th October.

On the 2nd November, he left upon the premises in respect of which the taxes were payable, and with the person then in possession, a notice specifying the amount of the taxes, at the foot of which was also printed the following demand: "You are requested to pay your taxes on or before the 31st day of December, according to city by-law. After that date five cents on the dollar will be added to the above amount. Early payment particularly requested." The date of leaving the notice was then duly entered by the collector upon the roll.

It was urged, however, that this notice, which was the only one given by the collector, was premature, and could not, though regular in form, support a distress for the taxes made in March, 1888, because by a general by-law of the town the time for payment of taxes was extended until the 31st December in every year, so that no demand or notice, in default of compliance with which the collector could distrain, could be given before that time had expired. This by-law No. 322, entitled "By-law to provide for the addition of a percentage charge in case of non-payment of collector shall have an office which he shall keep open from taxes," enacted, as amended by by-law No. 396, (1) The collector shall have an office which he shall keep open from 10 a.m. to 2 p.m., during the months of October, November,

Judgment.

OSLER
J.A.

and December in each year. (2) All taxes and assessments shall be paid into the office of the said collector by the 31st December in each year. (3) An additional charge of five cents in the dollar is hereby imposed upon every tax and assessment remaining unpaid after the said 31st December, which shall be added to such unpaid tax or assessment, and be collected by the collector as if the same had been originally imposed and formed part of such unpaid tax or assessment.

It is clear that this by-law was not made, and that it cannot be supported, under section 364 of the Municipal Act, for the reasons I have already mentioned. It is one made under the authority of 43 Vic. ch. 27, sec. 20, which is substantially the same as sec. 53 of the Act as now found in the R. S. O. ch. 193.

This section enacts that the council may, by by-law, require the payment of taxes to be made into the office of the treasurer or collector by any day or days to be named therein "in bulk" or by instalments, and may thereby allow a discount for the prompt payment of the same or any instalment on or before the day or days on which the same shall be made payable, and may by such by-law impose an additional percentage charge thereon which shall be added to the unpaid tax, and be collected by the collector as if the same had originally been imposed, or formed part of it.

We may now refer to those sections of the Act which define the duty of the collector.

Section 122. Upon receiving his roll he shall proceed to collect the taxes.

Section 123. In cities and towns he shall call at least once on the person taxed, or at his usual place of residence or business if within the municipality, and demand payment of the taxes, or (an alternative first introduced by 45 Vic. ch. 28, sec. 5) he shall leave with the person taxed, or at his residence, &c., or upon the premises in respect of which the taxes are payable, a written or printed notice specifying the amount of such taxes, and shall at the time of such demand, or

notice, or immediately thereafter, enter the date thereof on his roll opposite the name of the person taxed, &c., which entry shall be *prima facie* evidence of such demand or notice. In places other than cities or towns a demand must be made without the option of leaving a notice.

Judgment.

 OSLER
J.A.

Section 124. In case a person neglects to pay his taxes for fourteen days after such demand, or in the case of cities or towns after such demand or notice as aforesaid, the collector may proceed to levy the tax by distress and sale, &c.

In the case of cities and towns the notice is simply made equivalent to a demand, and the right of the collector to distrain depends upon the party having neglected to pay his taxes for fourteen days thereafter, that is to say upon his making default after such demand or notice. But before he can be said to have neglected to pay or to be in default the collector must have been in a position to make the demand, or give the notice, as, if validly made or given, the right to distrain arises immediately upon the expiration of the fourteen days therefrom, and reading the sections defining the duty of the collector with section 53, it appears to me impossible to say, in the face of a by-law which fixes a time by which the taxes shall be paid, that he was in such a position before that time had elapsed. Had the by-law allowed a discount for prompt payment at or before a time named, this would seem very plain. The collector could not have entitled himself to distrain, and accelerated the time for payment of the taxes, by giving notice or serving a demand before the day fixed by the by-law. It is an argument in support of this view that sec. 53 has been amended by 51 Vic. ch. 29, sec. 5, and it would now seem (for the language of the amending section is such as to make it undesirable to express too positive an opinion of its meaning) to be enacted that the fourteen days demand,—nothing being said about the notice—may be made previous to the time fixed for payment of the taxes, in other words, previous to the default.* I see nothing in the Act which makes it necessary, as was con-

*See now 52 Vic. ch. 39 (O).—REP.

Judgment.

OSLER
J.A.

tended, that a yearly by-law should be passed; it may well be one of the standing by-laws of the municipality.

For these reasons I am of opinion that the notice of the 2nd November was not one which enabled the collector to distrain for nonpayment of the taxes. For that purpose he should have given or served a notice or demand after the 31st December. No doubt this was an extremely inconvenient course, but as the law then stood I think the Legislature had not provided otherwise. The case of *Chamberlain v. Turner*, 31 C. P. 460, I still think well decided in the result, though further consideration has led me to the conclusion that in some respects it was not put on the right ground, the by-law there in question having been wrongly, as I now think, upheld as a valid by-law under the section relating to the period of the fiscal year, R. S. O. 1877, ch. 174, sec. 347, (R. S. O. 1887, ch. 184, sec. 364,) instead of as one fixing the time for payment under 43 Vic. ch. 27, sec. 20, (R. S. O. 1887, ch. 194, sec. 53,) which does not appear to have been referred to in the judgment.

The sale being invalid, none of the defendants can make title under it, and the appeal must be dismissed; but even if the collector and bailiff could have defended themselves under it, the other two defendants could not have done so for very obvious reasons. The safe in question was the property of the plaintiffs in the possession of Holmwood, the tenant of the premises, under an agreement commonly known as a hire receipt. If Holmwood had purchased it at a sale for his taxes, he could not have set up his title as tax purchaser against the plaintiffs' claim under their agreement. The defendant Gordon assumed Holmwood's position, taking over the safe without acquiring any other title than Holmwood had to it, and agreeing in consideration of the transfer of certain property to him, including the safe, to pay Holmwood's proportion of the taxes for the year.

After he had received actual notice of the real nature of the plaintiffs' title he caused the collector to seize and sell the safe in order to defeat it by selling it for the very taxes which as between Holmwood and himself he had

undertaken to pay. He cannot therefore, any more than Holmwood could, assert a title under the tax sale.

Judgment.

OSLER

J.A.

Putland had obtained the safe from Gordon in some transaction between them relating to the hotel prior to the sale, and the latter's object in setting the collector in motion was to give Putland a title and protect himself. But as Gordon acquired no real title at the tax sale, his purchase thereat cannot enure to validate his previous transfer to Putland. I do not think for a moment that the collector and his bailiff colluded with Gordon in the sense of being privy to his fraudulent design against the plaintiffs. I think they were honestly doing what they believed they had a legal right to do.

If they had been in a position to distrain they would have been protected, and I make no doubt could have given a valid title to a *bond fide* purchaser, a position which the defendant Gordon under the circumstances never could have occupied.

I must add that it appears to me quite unnecessary to have made the bailiff and collector defendants in this action of replevin. The safe was in Putland's possession, no difficulty was anticipated in obtaining it, and no special damages were sought against anybody. The appeal must be dismissed.

Appeal dismissed with costs.

SMITH V. MILLIONS.

Survey—Plan part of description in deed.

When a conveyance describes the property by reference to a plan the plan becomes incorporated with the conveyance, and just as much part of the description as if it had been drawn upon the face of the conveyance, and to determine what passes by the conveyance, the description and plan alone are to be looked at, their construction being a question of law.

Where, therefore, lots were sold by reference to a plan, and in the plan the lots were laid out in rectangular and not in rhomboidal shape, the dividing lines between the lots were held to run at right angles to the admitted line of frontage, and the ownership of the land in dispute was determined by this test.

Statement.

THIS was an appeal by the defendant from the judgment of the Common Pleas Division, reported 15 O. R., 453, and came on to be heard before this Court (HAGARTY, C. J. O. BURTON, OSLER, and MACLENNAN, JJ. A.) on the 15th day of January, 1889.

Taylor McVeity, for the appellant.

Lash, Q. C., for the respondent.

March 5th, 1889. BURTON J. A.:—

The plaintiff seeks to recover damages for trespass on a piece of land which he claims to own as lot No. 2 in a plan made by one Gilmour for the former proprietor, Thomas O'Brien. The defendant claims title to the same property as lot. No. 3 in the same plan.

Both parties claim through O'Brien and the lands were conveyed to them nearly about the same time as the lots bearing these respective numbers and by reference to the plan, without further description by metes and bounds or otherwise. The plan itself was produced from the registry office, and was made as long ago as May, 1877.

There is no material discrepancy in the evidence as to the position of the block of land of which these lots form a part. It was found that there was a mistake made in

including in it part of the land belonging to the By
Estate, but that does not in any way affect the question.
It is admitted that some few feet of lot 4 were in fact not
within the block, and an allowance was made by O'Brien
to the purchaser of that lot.

Judgment.
BURTON
J.A.

The corners then of lots 2 and 3 on George Almond Street are not disputed. The sole question is, when the purchasers of these lots had them conveyed to them by reference to a plan, what was the proper course to pursue in ascertaining their boundaries?

It is of course familiar law that where the conveyance describes the property by reference to a plan the plan becomes incorporated with it, and it becomes just as much part of the description as if it had been drawn upon the face of the conveyance, and referred to as the land intended to be conveyed.

Looking at the plan and the conformation of the block, one end on Canal Street forming an acute angle with the front on George Almond Street, whilst the western boundary runs at a different angle with the same street, it may reasonably be assumed that the owner did not intend to lay off the lines of the centre lots parallel either to Canal Street or the western boundary.

The leading feature of the plan was, as it seems to me, to lay off two lots of equal width and of a rectangular form in the centre of the block, leaving two lots on either side which would differ in width and be irregular in form, both having a greater width in front than in rear.

That strikes one as what a person would naturally do in laying out a broken block of that kind. That is, to secure two good shaped lots instead of continuing the irregularity through the whole, the more so as the lines at each extremity diverge in opposite directions.

This, therefore, appears to me to be the leading feature of the plan, and if by laying out those lots in that way it happens that a less width appears upon the ground as the rear line of lot No. 1 than is shown on the plan, that is not different from our every day experience in laying out

Judgment.
BURTON
J.A.

a survey, which leaves frequently a gore or lot at the extremity of the survey varying in dimensions from the other lots in the survey, but I cannot accede to the view that the figures shown in rear of lot No. 1 are to disarrange the whole scheme.

It has not even the specious argument in its favour that by its adoption a line would be run parallel to Canal Street. The plan on its face shows lines which appear to be at right angles, and the surveyor called by the respondent tested them and declared them to be drawn at right angles, and the line now sought to be adopted is not parallel to either the east or the west limits of the block, but it is claimed that the lines of these lots should be run to a point 54 feet from Canal Street because the width of lot No. 1 is marked as 54 feet in the rear—in other words, making that the leading feature in the construction of the plan.

We must bear in mind that this lot was not conveyed as being in accordance with an actual survey, but according to a plan. If in point of fact there had been a survey and a post planted 54 feet from Canal Street as the north-western corner of lot No. 1, evidence of that fact would have been inadmissible.

We can look only at the plan, and the construction of that plan is for the Court as a question of law. This clearly shows that the side lines of these two lots are at right angles to the street and parallel to each other and not so with either Canal Street or the western boundary. I am of opinion, therefore, that effect must be given to that as the governing feature of the plan, and that the learned Judge at the trial was on that ground correct in holding that as a matter of legal construction the plaintiff had failed to make out any case.

Lewis' survey was important only as showing that the fence was upon, or a little within, a line drawn at right angles to George Almond Street from a point not disputed as the proper starting point.

I am of opinion, therefore, that the result arrived at by

the learned Judge at the trial was correct and that his judgment should be restored.

Judgment.

BURTON
J.A.

It was, I think, stated upon the argument that the appellant purchased his lot some time before he got his deed, although I do not find anything in the evidence to warrant it beyond the fact that his purchase was for \$500, and that with arrears it amounted to \$520, which seems to point to the fact that his purchase was some time anterior to his deed. If that fact had been established it might have materially lightened our labours, as in that case he would have been the equitable owner of his lot long before the respondent had any title, and the acts and representations of O'Brien, which, as the case is now presented, are not admissible in evidence as showing what he intended by lot No. 3, would have been pertinent and binding upon parties claiming through him.

OSLER J. A. :—

I agree with the judgment about to be delivered by my brother MacLennan. I was for some time inclined to the opinion that inasmuch as lot No. 1 on the plan was described as being 54 feet in width at the rear, measured from Canal Street to lot No. 2, a width which could not be given to it if the lines dividing the lots were at right angles to George Almond Street as shewn by the plan, there was an ambiguity which justified us in adopting that reading of the plan, which, without giving less land to lots 2 and 3 than the plan assigns to them, would also give to lot 1 its full quantity in accordance with the rule expressed in *Herrick v. Sixby*, L. R. 1 P. C. 436, 451, though the effect of doing so would be to alter the position of the lot lines, and the shape of the lots as delineated on the plan.

Further consideration has convinced me that that case is inapplicable, and that such a construction of the plan as the respondent contends for is inadmissible, and not consistent with authority. The given width in the rear

Judgment.

OSLER

J.A.

of lot 1 between Canal Street and the east side of lot 2, indicated by the figures "54," must be rejected as an error, and the lines between the lots taken, as the plan shews them to be, at right angles to George Almond Street. My learned brother has forcibly pointed out some of the inconveniences which might arise if any other construction of the plan were legally admissible.

MACLENNAN J. A.:—

On the 14th October, 1862, the Crown, by patent of that date, granted to Thomas O'Brien in fee a piece of ordnance land in the City of Ottawa containing one acre and a fraction, described in the patent as lot 1 on a plan made by W. R. Thistle, P. L. S., and also by metes and bounds and astronomical bearings. Thomas O'Brien soon afterwards died, having devised the land in fee to his son Michael.

In May, 1877, Michael O'Brien had a plan of the patented land prepared by one Robert Gilmour, a P. L. S., on which a street called George Almond Street is laid out, and on which the land is subdivided into eight lots, three of which, numbered respectively lots 1, 2, and 3, abut upon the north limit, and three other lots, also numbered 1, 2, and 3, on the south limit of the street. This plan was registered on the 4th May, 1877.

On the 31st March, 1887, Michael O'Brien conveyed in fee to the plaintiff lot 2 on the north side of George Almond Street, for valuable consideration, paid three or four days afterwards.

On the 12th of April, 1887, O'Brien conveyed lot 3 on the north side of the street in fee to the defendant, also for a valuable consideration duly satisfied, and the defendant's deed was registered on the following day, the 13th of April. I do not find it stated anywhere that the plaintiff's deed was registered, but I shall assume for the purpose of my judgment that it was registered before the defendant got his deed.

When Gilmour's plan is looked at the plaintiff's and defendant's lots both appear to be rectangular lots, each 60 feet in front on George Almond Street by 72 feet in depth.

Judgment.

MAOLENNAN.

J.A.

The defendant took possession of his lot immediately and built a house upon it, and he also built a fence between lots 2 and 3, and he placed both the house and fence on the assumption that his lot was rectangular.

The plaintiff afterwards complained that the defendant's fence was wrongly placed, that it should not be run at right angles to the street, but at an oblique angle varying several degrees from a right angle, that while it started at the proper point on George Almond Street it encroached 10 feet upon the plaintiff's lot at the rear. This was a very serious contention for the defendant, who had built his house in great part upon the disputed ground, and upon his refusal to give it up this action was commenced on the 28th July, 1887, the plaintiff claiming it as part of lot No. 2. The learned Judge who tried the action found for the defendant, and that both lots were rectangular, but his judgment was reversed by the Divisional Court, and the defendant seeks by this appeal to have the judgment in his favour restored.

The plaintiff obtained and (as I assume) registered his conveyance first. If the disputed ground is covered by his deed he is entitled to succeed, no matter what the defendant bought or thought he was buying, and no matter how the defendant's lot is described in his deed. If O'Brien had conveyed it to the plaintiff on the 31st of March, he could not convey it to the defendant on the 12th of April.

The question then is, whether the disputed ground is covered by the plaintiff's deed, and it is therefore necessary to see what the deed contains. Omitting unnecessary words the plaintiff's deed conveys: "Sub-lot 2 on the north side of George Almond Street *as laid out on a plan* of O'Brien's block made by Robert Gilmour, P. L. S., which plan is a plan of lot No. 1 according to a plan of subdivision by W. R. Thistle, P. L. S., of lands formerly

Judgment.
MACLENNAN
J.A. held by one Thomas O'Brien from the Ordnance Department, and which is more particularly described in the original grant thereof from the Crown dated the 14th October, 1862—which said lot is 60 feet in width by 72 feet in depth be the same more or less.”

That is the whole description. There is no mention of metes or bounds or of any marks or monuments on the ground, or of any survey or other mark having been made or drawn on the ground for the purpose of the plan.

Now the law governing the construction of such a conveyance is laid down by Mr. Justice Strong, in *Grasett v. Carter*, 10 S. C. R. 105, at p. 114, as follows:

“When lands are described by a reference, either expressly or by implication, to a plan, the plan is considered as incorporated with the deed,” and, “extrinsic evidence of monuments and actual boundary marks found upon the ground, but not referred to in the deed, is inadmissible to control the deed.”

What has to be attended to, therefore, in order to determine what passed to the plaintiff is the deed and the plan alone, and the evidence given at the trial of matters not referred to in the one or the other is to be excluded.

Both the deed and the plan refer to the patent which describes O'Brien's lands by metes and bounds, and monuments and landmarks and also astronomical bearings, and when the plan and patent are compared they are found to correspond with substantial accuracy, there being a difference of only thirty-two minutes in the bearing of Canal Street, and only eight minutes in the bearing of George Almond Street.

When the plan is applied to the ground George Almond Street is found without difficulty ; neither is there any difficulty in finding lots 2 and 3. They are both identified at once so far as their frontage is concerned, and there is no dispute as to the exact situation and extent of the frontage of either of them. Both lots are there on the ground just as they are on the plan, each with a frontage of 60 feet.

The question which has been raised is as to the shape of the lots. If they are rectangular the plaintiff fails, and to enable him to support the judgment he must make out that the boundary between the lots must deviate from a right angle several degrees in order to cover the disputed triangle.

Judgment.
MACLENNAN
J.A.

It is not, and indeed could not be, disputed that in each lot the opposite sides are equal. The deeds so describe them. They are both described in the deeds as 60 feet in width by 72 feet in depth more or less. But the plaintiff contends that they are not rectangular but rhomboidal, or, as described by the witnesses, that they lie back from the street on a *skew*.

I think this contention of the plaintiff fails, and with great respect I think that the Divisional Court has gone wrong in not attending sufficiently to the language of the plaintiff's deed.

What the deed conveys is lot 2 *as laid out on the plan*, 60 feet in width by 72 feet in depth be the same more or less, and the sole question is, how is the lot laid out on the plan?

When the plan is produced the lines are found to be drawn perpendicularly to the street, and this is true of the defendant's lot as well as of the plaintiff's. That it is so cannot be disputed. It is obviously so to the eye. It is found to be so when an instrument is applied, and the plaintiff's surveyor, as well as the defendant's, admitted it to be so.

When the question is asked, how is this lot 2 laid out on this plan, I think there can be but one answer, namely, that it is a rectangular, not a rhomboidal lot, and I think it is impossible to find anything on the face of the plan or in the deed, or in both together, to indicate that the lot should be anything else than rectangular.

The judgment under consideration proceeds upon the fact, ascertained from a survey and measurement on the ground, that the rear line of another lot on the plan, namely, lot 1, is erroneously stated in the plan to be 54

Judgment.
MACLENNAN
J.A.

feet in length, instead of 44, and that in order to give that lot its proper width in the rear the plan must be changed and the lines of lots 2 and 3 must be run obliquely.

But in my judgment that is not construing the deed, but making a new deed. When O'Brien, the owner of the lots, has conveyed lot 2 *as laid out on his plan*, what has his grantee to do with the way other lots are laid out, or with mistakes in their bearings or dimensions or quantities? I cannot see that any such mistakes affect the matter in the least. The sole question is how is lot 2 laid out, and he is entitled to it just as it is.

It is said that the shape of lot 2 must be altered because otherwise lot 1 will not be as wide in the rear as designated on the plan. Does that not mean that lot 2 is to be laid out *de novo* and that the grantee of lot 2 is after all *not* to have it as laid out in the plan?

It would surely not be allowable for O'Brien after making this deed to say: "I find there is a mistake in the plan. The rear of lot 1 in the plan is only 44 feet instead of 54. So you must submit to have the plan rectified and to have your lot in the shape of a rhomboid instead of a rectangle." The answer would surely be: "I have nothing to do with your other lots. I bought a lot plainly laid down in the plan as a rectangular lot and if you made any mistake that is your affair." The consequences of any other rule would be sufficiently startling. In this case the number of lots in the plan is small, four on each side of the street. But the rule must be the same whether there are four or four hundred adjacent lots. Is the rear of every lot sold according to a plan liable to be shifted on the discovery of a mistake in the dimensions of any other lot in the range as laid down in the plan, and this at any time within ten years after the sale and in spite of fences, buildings and other improvements? Yet if the judgment be right that is what must happen.

In my opinion such an alteration of the plan referred to in this deed is inadmissible, and the plaintiff's rights must be determined by the plan as it is, and not as altered by

the plaintiff's surveyor, and the plaintiff's lot is therefore in my judgment a rectangular lot, and it follows that he is not entitled to the piece of land in dispute.

Judgment.

MACLENNAN
J.A.

I have considered whether any argument can be deduced from the magnetic bearing laid down on the plan, of the line between lots 1 and 2 on the south side of George Almond Street. This magnetic bearing is N. 37° W., and I find that the astronomical bearing of a line at right angles to George Almond Street, would be N. 32°.08' W., a difference of 5°. Owing to the variation of the compass, it is impossible to draw any useful inference one way or other from this difference.

I am of opinion that the appeal should be allowed with costs to the defendant both here and in the Divisional Court.

HAGARTY C. J O. concurred.

Appeal allowed with costs.

MAY V. REID.

Parliamentary elections—Private prosecutor—Prosecution under R. S. C. ch. 8, sec. 111—Costs.

The plaintiffs were tried for bribery at an election at the Haldimand Assizes in the Spring of 1887 and acquitted. The information upon which the indictment was supposed to have been founded was laid against them by the defendant and he was examined as a witness before the grand jury. At the conclusion of the trial the presiding Judge, at the request of the counsel for the accused, indorsed on the indictment the statement that it was proved that the defendant was the private prosecutor. The plaintiffs taxed their costs of the prosecution and brought this action to recover payment of these costs from the defendant. The information and indictment (there being no evidence connecting the latter with the former) with the endorsement and the fact that the defendant was examined as a witness before the grand jury were the only evidence that the defendant was the private prosecutor.

Held, that the endorsement on the indictment had no force as a judgment or finding of fact and could not be accepted as proof of the defendant's position.

Held, also, that the facts that the information was laid by the defendant and that he was examined as a witness before the grand jury were not sufficient evidence that he was the private prosecutor.

Decision of the County Court of the County of Lincoln reversed.

Statement.

THIS was an appeal by the defendant from the judgment of the County Court of the County of Lincoln.

The action was brought by the plaintiffs under the provisions of R. S. C. ch. 8, sec. 111, to recover from the defendant the costs incurred by them under the following circumstances.

On the 7th day of September, 1886, the following information was laid against the plaintiffs by the defendant:

<p>COUNTY OF HALDIMAND,</p> <p>TO WIT :</p>	}	<p>The information and complaint of George U. Reid, of the township of North Cayuga, in the county of Haldimand, who saith that George Smith and Charles May, both of the village of Dunnville, did bribe one Henry Cribbins to vote for William Hamilton Merritt, a candidate for the House of Commons, in the election September 1st and 8th, 1886, and did, on the 7th September, A.D. 1886, pay said Henry Cribbins fifteen dollars therefor, and said information is made to the best of the knowledge and belief of the said George U. Reid.</p>
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(Signed) GEORGE U. REID.

Sworn before me at North Cayuga, this 7th day of September, 1886.

(Signed) JOHN FRADENBURGH, J. P.

Upon this information the following indictment was ^{Statement.} preferred against them :

COUNTY OF HALDIMAND, } The Jurors for our Lady the Queen upon
TO WIT: } their oath present, that Charles May and
George Smith, on the 7th day of September,
in the year of our Lord one thousand eight hundred and eighty-six, at
the Township of North Cayuga, in the County of Haldimand, at the
election for a member to serve in the House of Commons of Canada, for
the Electoral District of Haldimand, holden on the eight day of September,
in the year of our Lord one thousand eight hundred and eighty-six,
were guilty of bribery against the form of the Statute in such case made
and provided.

(Signed) JOHN KING,
Crown Counsel.

At the Fall Assizes in 1886 a true bill was found on this indictment, but the Crown would not then proceed to trial.

The defendant was examined before the grand jury as a witness, and the fact that he had been so examined was endorsed on the indictment.

The plaintiffs were tried on the 14th day of March, 1887, and acquitted.

The following is a copy of the judgment then entered :

REGINA V. CHARLES MAY AND GEORGE SMITH.

And thereupon at the same session of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery of our said Lady the Queen, holden at Cayuga before the Honourable Sir Matthew Crooks Cameron, duly presiding in the said Court, come the said Charles May and George Smith in their own proper persons, and having heard the said indictment read, the said Charles May and George Smith say they are not guilty, and of this they put themselves upon the country, and John King, Esquire, who prosecuted in this behalf for our said Lady the Queen, doth the like. Therefore let a jury thereupon immediately come before the said the Honourable Sir Matthew Crooks Cameron last mentioned here, by whom the truth of the matter may be better known, and who have no affinity to the said Charles May and George Smith, to recognize upon their oath whether the said Charles May and George Smith, be guilty of this misdemeanour in the indictment aforesaid above specified or not, because as well the said John King, who for our said Lady the Queen prosecutes in this behalf, as the said Charles May and George Smith have put themselves upon the jury, and the jurors of the said jury by the Sheriff of the said County of Haldimand empanelled for that purpose and returned, to wit, Thomas Hammond, George Easton, George Johnstone, Henry Buck, Colin Baker, William Martin, Simeon Brown, Robert Evans, Joseph

Statement. Brown, Samuel Amsden, William Hamilton, Henry Hamilton, who being called, come, and being elected, tried and sworn to speak the truth of and concerning the premises, upon their oath say that the said Charles May and George Smith are not guilty of the misdemeanour aforesaid, as by the indictment aforesaid is above supposed and charged against them.

At the conclusion of the trial the presiding Judge, at the request of the counsel for the accused, made the following endorsement on the indictment :

At the request of the defendants I endorse that it was proved on the trial of this indictment that George U. Reid was the private prosecutor.

(Signed)

M. C. CAMERON,

C. J. C. P.

Subsequently the plaintiffs taxed their costs of their defence at \$125.98, and brought this action against the defendant for the recovery of this sum.

The case was tried at St. Catharines before his Honour Judge Senkler, on the 14th day of December, 1887. No oral evidence was given, but the plaintiffs relied entirely on the documentary evidence above set out, and the allocatur of the taxing officer. The learned Judge reserved his decision, and on the 16th day of April, 1888, gave judgment in favour of the plaintiffs.

From this judgment the defendant appealed, and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.) on the 16th day of January, 1889.

Aylesworth, for the appellant.

Lash, Q. C., for the respondents.

March 5th, 1889. HAGARTY C. J. O. :—

I am of opinion that the evidence offered was insufficient to warrant a finding against the defendant for the plaintiffs' costs. The whole evidence against the defendant is, that he laid an information that the plaintiffs did bribe a man to vote for a candidate at the then last election for the House of Commons, and that he made it to the best of his knowledge and belief :—no process is prayed.

At the trial this information was proved.

Judgment.

Next an indictment found by the grand jury is produced, and on the back are the names of four witnesses, defendant being one, marked as "sworn" with the initials "W. P." intended for the initials of the foreman, and on the indictment was a certificate of the presiding Judge that at the request of the then defendants (who were acquitted) he indorsed: "that it was proved on the trial of this indictment that George U. Reid was the private prosecutor."

HAGARTY
C.J.O.

This was the whole evidence offered.

The defendant's counsel tendered the defendant as a witness to prove that he did not intend to proceed under the statute, and did not proceed under it, and took no proceedings on the indictment.

It did not appear or was not shown that any warrant or summons was issued on the defendant's information.

It is conceded that there was no statutable authority to the learned Chief Justice to give the certificate endorsed by him on the indictment. The fact of the defendant being a private prosecutor, within the meaning of the Act, should have been proved, and not left to inference.

It is perfectly consistent with the evidence actually produced that all the defendant did was to inform, in a legal manner, a Justice of the Peace that a felony or misdemeanour had been committed to his knowledge. It was not a complaint of any injury or outrage to the defendant's person or property, nor did it exhibit any personal interest in him beyond or above that of the general public in the subject matter. He asks for no action—he makes the statement, leaving the law, if it please, to take the matter up.

In the event of further proceedings he would naturally be called by subpoena as a witness at the trial. The fact that he did so appear to testify raises, in itself, no presumption in my mind that the prosecution was his own and not that of the Attorney-General, or his representative at the Assizes, acting for the Crown.

The statute law, I think, clearly recognizes and provides for the case of a prosecutor. It declares the act of bribery

Judgment.

HAGARTY
C.J.O.

to be a misdemeanour, which could of course be prosecuted by the Attorney-General for the public. It is also allowed to a private person to sue for a \$200 penalty, with costs of suit. R. S. C. ch. 8, sec. 84.

Section 110, of R. S. C. ch. 8, declares that the criminal Court in any prosecution under the Act may order payment by the defendant to the prosecutor of such costs and expenses as appear to have been reasonably incurred in the conduct of the prosecution; but the Court shall not make such order unless the prosecutor, before or upon the finding of the indictment, or the granting of the information, enters into a specified recognizance with sureties to the satisfaction of the Court to conduct the prosecution with effect, and pay the defendant his costs if acquitted. And the next section, 111, declares that in case of an indictment or information by a private prosecutor under the Act, if judgment is given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the defendant by reason of such indictment or information, to be taxed by the proper officer of the Court in which the judgment is given.

It seems, I think, clear from the statute, that the position of a private prosecutor and that of the Attorney-General, or his representative at the Assizes, is distinguished. Where the private prosecutor gives security "to conduct the prosecution with effect," he must be regarded as an actor and not as a mere witness called to testify for the Crown.

It seems to me that a principle of very great importance is involved in the present case.

Any good subject if he see, or know of, the commission of any felony or misdemeanour of any kind, may think it is his duty, to inform the nearest Justice of the Peace thereof and depose before him as to what he saw or knew. In doing this he may have no personal interest whatever at stake or which he seeks to protect. He may have no idea of undertaking the labour, cost, or loss of time of prosecuting. He leaves that in the hands of the local authority. He next receives a subpoena or attends on notice on the trial, or to testify before a grand jury. This he does, and

this is the sum and substance of this suit against him, charging him as a private prosecutor. At the trial he was refused the privilege of testifying on his own behalf that he did not do anything to warrant his being charged as such, and this was refused to him, as is stated by the learned Judge, on the ground that the information must speak for itself, and that he would then be trying the fact certified by the learned Chief Justice. But it is already shewn that the latter had no authority so to certify, and therefore his certificate does not prove the fact.

Judgment.

HAGARTY
C.J.O.

We are not trying a case for malicious prosecution, on the ground that the present defendant maliciously and without probable cause went before a magistrate and made the charge on which, and in consequence of which, the criminal law was set in motion against the plaintiffs. The distinction seems very plain between the two cases.

I do not think it necessary to discuss the general question as to what is a private prosecutor. A good deal could be found on the subject in *Regina v. Patteson*, 36 U. C. R. 129, in the elaborate judgment of the Court in a criminal libel case.

I think the Dominion Elections Act sufficiently indicates the position of such a prosecutor.

Other objections were taken, which need not be discussed. I think the appeal must be allowed.

OSLER J.A. :—

The plaintiffs were indicted and tried for the offence of bribery committed at an election for the Electoral District of Haldimand, held in 1886. Having been acquitted, they bring this action under section 111 of the Election Act, R. S. C. ch. 8, to recover their costs of defence.

This section enacts that in case of an indictment or information by a private prosecutor for any offence against the provisions of this Act, "if judgment is given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the defendant by reason of

Judgment.

OSLER
J.A.

such indictment or information, which costs shall be taxed by the proper officer of the Court in which the judgment is given."

The question is whether the defendant was proved to be the private prosecutor of the indictment.

Private prosecutor is not a technical term or term of art. Whether a person was or was not the prosecutor of an indictment, is a question of fact, a matter to be determined by enquiry in the particular case. In *Regina v. Patteson*, 36 U. C. R. 129, Morrison, J., says that the term "is used throughout our criminal statutes as indicating the person injured or aggrieved, and provision is made for such person being bound over to prosecute and prefer indictments."

It is not confined, however, to such persons, as may be seen from the Act now in question, which evidently contemplates that a person may be the private prosecutor of an indictment for the offence of bribery, in respect of which of course he cannot be said to be a party injured or aggrieved; and the case of *Rex v. Incledon*, 1 M. & S. 267, shews that a person may stand in the position of a private prosecutor without being a party grieved.

In the case of *Regina v. Patteson*, already referred to, the observations of Wilson, J., at p. 150, are applicable to the enactment now in question. "The mere fact that the Crown prosecutes in the ordinary course and routine of business as pursued in this country, by a counsel it appoints for the purpose, will not necessarily make it a proceeding not carried on by a private prosecutor, within the proper meaning of the statute to be given to it, otherwise every criminal prosecution in this country would be a Crown prosecution, and the enactment be of no kind of use." And I quote a passage from the judgment of Richards, C. J., in the same case, addressed to the argument that because counsel for the Crown, or acting for the Attorney-General, conduct the prosecution at the assizes etc., there can be no private prosecutor. "It is true that in practice in this country the Attorney General selects counsel, who are paid by the Crown, to conduct prosecutions at the Assizes,

but I apprehend that many of these prosecutions are instituted by private prosecutors who are bound over to prosecute, and who are often sued for malicious prosecutions when they fail to make out a case before a jury."

Judgment.

OSLER
J.A.

A person may, however, be a private prosecutor who is not bound over to prosecute, as section 110 of the Act implies. That section provides that any criminal Court before which any prosecution is instituted for any offence against the Act may order payment by the defendant to the prosecutor of the costs of the prosecution, but not unless the prosecutor before or upon the finding of the indictment etc. has entered into a recognizance with sureties to conduct the prosecution with effect and to pay the defendant his costs in case he is acquitted.

In *Rex v. Commerell*, 4 M. & S. 203, a case arising under 13 Geo. III., ch. 78, sec. 64, which enacts that it shall and may be lawful for the Court before whom any indictment or presentment (under the Act) shall be tried, to award costs to the prosecutors, or to the person indicted, Lord Ellenborough said: "As to the point whether the persons by whom the costs are directed to be paid were the prosecutors, in many cases it is not a matter of certainty who the prosecutor is; on the contrary, it may be a very nice and intricate question; for we know that in an action for malicious prosecution, if the prosecutor be kept out of sight it sometimes becomes a point of very subtle evidence to determine. But *id certum est quod certum reddi potest*, and it is a question to be ascertained by enquiry and evidence."

In Roscoe on N. P. Evidence, 13th ed., p. 850, it is said that the proper evidence to establish the fact is that the defendant employed an attorney or agent to conduct the prosecution: that he gave instructions concerning it: paid the expenses: procured the attendance of witnesses, or was otherwise active in forwarding the prosecution.

Now in this case the only facts offered to prove that the defendant was the private prosecutor, were (1) an information laid by him before a Justice of the Peace, a month

Judgment.

OSLER
J.A.

before the Assizes at which the indictment was found, charging the plaintiffs with the bribery of one Cribbins at the election by paying him \$15 to vote for one of the candidates. (2) An indictment, signed, John King, Crown counsel, alleging (as permitted by section 112 of the Act) merely that the plaintiffs were "guilty of bribery" at the election; on which indictment the defendant's name was endorsed as a witness sworn before the grand jury, and which appeared to have been traversed to a succeeding Assizes at the request of the Crown. (3) A certificate endorsed upon the indictment by the Judge before whom it was tried, "that it was proved on the trial of this indictment that George U. Reid was the private prosecutor."

I do not think any of these facts alone or all of them taken together sufficient to fix the defendant as private prosecutor of the indictment, for (1) as to the information; although it is laid down that proof of the information of the defendant taken by the magistrate is evidence that the defendant was prosecutor, (Roscoe, N.P. 13th ed. 850) yet that must be where the prosecution is connected with the information in some manner. Here it is not to be inferred that the charge specified in the information is the same charge of bribery alleged generally in the indictment and there is nothing to shew that any proceedings took place upon the information before the magistrate or that the plaintiffs were committed for trial upon the charge mentioned therein. (2) As to the indictment, the endorsement of the defendant's name on the bill is evidence that he was sworn as a witness, but not of his being prosecutor. Buller's N. P. 14. These circumstances therefore are quite consistent with the prosecution being a public one at the suit of the Crown.

Then as to the certificate: unless the Act expressly authorizes the Judge to give such a certificate for some purpose, which is not suggested, it can have no force as a judgment or finding of fact. The Judge has no power to make any order upon the prosecutor to pay the defendant's costs. The difference between sections 110 and 111 is marked.

The former authorizes the Court "to order payment by the defendant to the prosecutor," of the reasonable costs of the prosecution, and the prosecutor is ascertained and identified by the recognizance he is required to enter into to entitle him to such an order. The latter merely provides that the defendant, if successful, "shall be entitled to recover" his costs from the prosecutor, which he may do upon the recognizance, if the prosecutor has given one, or by means of an action like the present if he has not: *Richardson v. Willis*, L. R. 8 Ex. 69. *Rex v. Commerell*, *supra*, was cited in support of the contention that the Judge who tried the indictment could also determine who the prosecutor was. But that case was decided upon a statute which vested in the Court before whom the indictment was tried, power to award costs to the person indicted against the prosecutor, and therefore, as Le Blanc, J., said, in order to exercise that authority it was necessary for the Court to determine who the prosecutor was.

Judgment.

 OSLER
J.A.

Our Act, as I have said, gives the Court no such authority, but leaves the defendant to his action. This, I think, was intended, so that, while on the one hand, a person should not be allowed to assert for the first time after the prosecution had succeeded that he was the private prosecutor and the criminal Court should not be embarrassed by entering upon an enquiry as to the fact, so on the other hand the defendant should not be deprived of his costs merely because the prosecutor refrained from entering into a recognizance.

The cases of *Regina v. Dunn*, 5 Q. B. 979, and *Regina v. Latimer*, 15 Q. B. 1077, were also cited. The former merely decides that "the prosecutors," (meaning the persons supporting certain Borough orders which had been brought up by *certiorari* and quashed), ought to have been identified in the course of the proceedings before any effectual order could be made against them for the costs, according to the usual practice of the Court. The latter is the case of a criminal information for libel, on the face of which of course the prosecutor was identified,

Judgment.

OSLER
J.A.

and against whom a side bar rule for the costs of the defence was obtained. Neither case is authority for holding that the Court or judge trying an indictment could enquire and determine for any purpose who the private prosecutor was.

I think the appeal should be allowed, and the action dismissed. I refer to *Regina v. Cooper*, 40 U. C. R. 294; *Regina v. Jackson*, 40 U. C. R. 290; *Regina v. Hart*, 45 U. C. R. 1; *Regina v. Manchester*, 7 E. & B. 453; *Regina v. Bushell*, 16 Cox C.C. 367.

BURTON and MACLENNAN, JJ. A., concurred.

Appeal allowed with costs.

IN THE MATTER OF CLARKE AND THE UNION FIRE
INSURANCE COMPANY.

Company—Dominion Winding-up Act—Constitutionality—Application of Act to Provincial corporation—Power of Court to direct reference to Master.

Held, affirming the decision of BOYD, C., that the Act, 45 Vic. ch. 22, (D.) now R. S. C. ch. 129, is *intra vires* the Dominion Parliament and applies to an insurance company incorporated by the Provincial Legislature.

Held, also, BURTON, J.A., dissenting, that a winding-up order under this Act having been made, and the liquidator appointed, by the Judge, the subsequent proceedings might properly be referred to the Master.

THIS was an appeal from the order of BOYD, C., declar-
ing the Union Fire Insurance Company insolvent, appoint-
ing a liquidator, and directing the Master in Ordinary to
take the necessary proceedings for winding up the com-
pany. Statement.

The Union Fire Insurance Company was incorporated under the Act of the Legislature of the Province of Ontario, 39 Vic. ch. 93. An action was brought against the company in the then Court of Chancery by one Alexander Stuart Clarke on behalf of himself and all creditors of the company, and in this action a decree was made under the general jurisdiction of the Court directing a reference to the Master in Ordinary to take all necessary proceedings for winding up the company. The reference was proceeded with in the Master's office, and evidence was taken in respect of claims by the company against alleged contributories, among others in the case of one William Shoolbred. Before judgment was pronounced in his case an application was made by Hugh Scott and Thomas Walmsley, creditors of the company, on behalf of themselves and all other creditors of the company, for a winding-up order against the company under the Dominion Winding-up Act, 45 Vic. ch. 23, as amended by 47 Vic. ch. 39, and an order was made declaring the company insolvent, and directing a reference to the Master in Ordinary to appoint a liquidator and wind up the company.

Statement. The order adopted the proceedings already taken in the Master's office in *Clarke's* suit, and made provision for payment of the costs of that suit. An application was made on behalf of Shoolbred to set aside this order, and ultimately on appeal to the Supreme Court of Canada the order was set aside on the ground that a reference to the Master to appoint a liquidator was improper. (See 10 O. R. 489; 13 A. R. 268.)

The Supreme Court referred the matter back to the Court of first instance.

Pursuant to this judgment the petition of Scott and Walmsley was brought on again for hearing on the 6th of September, 1887, and an order was made declaring that the Union Fire Insurance Company was an insurance company within the provisions of the Winding-up Act, and insolvent under the provisions thereof, and directing that the petition and the appointment of a liquidator should stand over until Tuesday the 20th day of September, 1887, and that in the meantime the petitioners should give notice to the creditors, contributories, shareholders, and members of the company of the proposed appointment of a liquidator.

Pursuant to this order an advertisement was settled by the registrar of the Court, and duly published, notifying the creditors, contributories, shareholders, and members of the company that a liquidator would be appointed on the 20th day of September, 1887.

On the 20th day of September, 1887, the petition was mentioned but no order was made except that the matter of the petition and the appointment of a liquidator should stand over to be brought on before the Court on the 27th day of September, 1887.

The petition was brought on again on the 27th day of September, 1887, and again on the 30th day of September, 1887. On each occasion some discussion took place as to the person who should be appointed liquidator, and on the 30th day of September the petition stood over indefinitely to enable the parties to agree if possible upon the person to be appointed.

The petition was not brought on again until the 9th day Statement of May, 1888, when an order was made, (14 O. R. 618), reciting the applications on the 27th and 30th days of September, 1887, and the notice to creditors, contributories, shareholders, and members published pursuant to the order of the 6th day of September, 1887, declaring that the Union Fire Insurance Company was an insurance company within the provisions of the Act, and was insolvent under the provisions thereof, and ordering that the company should be wound up by the Court under the provisions of the Act and the amendments thereto. The order appointed William Badenach, the receiver in the case of *Clarke v. The Union Fire Insurance Co.*, liquidator of the estate and effects of the company, but subject to his furnishing security to the satisfaction of the Master in Ordinary, and directed a reference to the Master in Ordinary to fix the liquidator's remuneration, to settle the list of contributories, to take an account of the assets, debts, and liabilities and all other necessary accounts, and to make all necessary enquiries and reports, and do all necessary acts and give all necessary sanctions to the liquidator for the winding up of the affairs of the company under the provisions of the Act and the amendments thereto.

The order further provided that the costs of the petition and of the reference, and also the costs of the plaintiff and of the defendant, payable under certain orders in the suit of *Clarke v. The Union Fire Insurance Co.*, should be taxed and paid out of the assets of the company.

The order further provided that the accounts and enquiries made in the suit of *Clarke v. The Union Fire Insurance Company* should stand, and be incorporated with and used in the winding-up proceedings as far as they could properly be made applicable, and also that the parties who had contested their liability in the suit of *Clarke v. The Union Fire Insurance Company* to be settled on the list of shareholders should be at liberty to apply to the Court after settlement of the list of contributories in this matter for the payment of such costs in the

Statement. suit of *Clarke v. The Union Fire Insurance Company* as they might deem themselves entitled to.

From this order Shoolbred appealed, and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.) on the 21st day of January, 1889.

Lash, Q.C., for the appellant. The company being incorporated under an Act of the Legislature of the Province of Ontario and carrying on business solely within the Province of Ontario is not subject to any legislation of the Parliament of Canada as to its winding-up and dissolution. The Province of Ontario having constitutionally provided for the winding-up and dissolution of companies incorporated by the Legislature of Ontario, the Parliament of Canada could not subsequently pass an Act for the same purpose. The Dominion Act is also *ultra vires* because it assumes to settle the rights and equities of shareholders or quasi-partners as between themselves. The Union Fire Insurance Company is not an insurance company within the meaning of the Dominion Winding-up Act. That Act applies only to insurance companies coming under the provisions of the Insurance Act of the Parliament of Canada: R. S. C. ch. 129, sec. 4; R. S. C. ch. 124, sec. 3, sub-sec. (c.) The company is not insolvent within the meaning of the Act if it applies, because no notice of non-payment of any claim has been given to the Minister of Finance: R. S. C. ch. 129, sec. 116; nor is the company one in process of liquidation, nor in process of being wound up, within the provisions of sec. 2, sub-sec. (g), and sec. 3, sub-sec. (b). The proceedings in *Clarke v. The Union Fire Insurance Company* cannot be deemed a winding up of the company or a liquidation within the meaning of the Act. That suit did not affect the powers or authorities of the directors or the rights and equities of the shareholders. At any rate the proceedings in *Clarke v. The Union Fire Insurance Company* were void. The proceedings and the decree in that suit were based upon the authority of *Harris v. The Dry*

Dock Company, 7 Gr. 450, but it is submitted that that **Argument.** decision was erroneous. Even if that decision is right, still, statutes having been since passed providing specifically for the winding up of Provincial companies, the general jurisdiction of the Court has been taken away. No proper notice was given to the creditors, contributories, shareholders, or members of the company, as required by section 10. No proper appointment of a liquidator has been made, as the appointment here made is a conditional or contingent one. The order improperly provides for payment out of the assets of the costs incurred in the suit of *Clarke v. The Union Fire Insurance Company*. The Master in Ordinary has by the statute co-ordinate jurisdiction with the Court or a Judge in the exercise of the powers conferred by the Act, and no order can be made by the Court or a Judge delegating or referring any matter or thing within its or his jurisdiction to the Master.

Bain, Q.C., for the respondent. The Act is purely an Insolvency Act, and within the power of the Dominion Parliament: *Shields v. Peak*, 8 S. C. R. 579; *Citizens Insurance Company v. Parsons*, 17 App. Cas. 96. All the questions raised by the appellant are disposed of by the judgment of the Supreme Court on the former application.

March 5th, 1889. OSLER J. A.:—

I am of opinion that this appeal should be dismissed.

I think, for the reasons given in my judgment and in that of Mr. Justice Patterson on the former appeal, 13 A. R. 268, that this insurance company, though incorporated by a Provincial Statute, was subject to the Dominion Winding-up Act, 45 Vic. ch. 23, and the amending Act of 1884, 47 Vic. ch. 39. On that point there was no difference of opinion in this Court. Nor do I think it was doubted by any of us that, for the purpose of making a winding-up order under sections 2 and 3 of the Act of 1884, the company was an insolvent company, and in course of

Judgment. liquidation, by force of the proceedings in the *Clarke* suit, within the meaning of section 2 of that Act.

OSLER

J A.

It is now, however, contended that, because in the recent revision of the statute law, the revisers have inserted in the group of sections 115 to 123, sub title, "Provisions applicable to insurance companies other than life insurance companies," a section No. 116, taken from the former Consolidated Insurance Act, 38 Vic. ch. 20, (1875), (D.), containing provisions as to when the insurance companies mentioned in that Act should be deemed insolvent, and as to the application of the government deposit, parliament is to be taken to have declared an intention to confine the operation of the Winding-up Act to insurance companies incorporated under the authority of the Dominion Insurance Act, R. S. C. 124. With this contention I do not agree. I think section 116 does not qualify or limit the sections 3, 4 and 5 in any way. On the contrary, I think it extends them by introducing an additional ground on which a Dominion company is to be deemed insolvent and liable to be wound up under the Act.

There is nothing to control the comprehensive language of section 3, which declares that the Act shall apply, inter alia to *all* incorporated insurance companies doing business in Canada *wherever* incorporated.

Moreover by section 4, it is only sections 8 to 96, both inclusive, which in the case of an insurance company, are declared subject to the provisions contained in sections 105 to 123 (including therefore 116) inclusive. This clearly leaves section 3 and sections 5 and 6, sub title "When company deemed insolvent" to their full operation as regards such companies.

I do not think that so radical a change in the scope and intention of the original Acts, has been effected by their mere revision and consolidation.

Then it is said that the Act does not authorize the Judge to refer to the Master in Ordinary the duty of carrying on the proceedings under the winding-up order. In the former appeal I felt compelled to hold that the terms of

the section under which the order was made imperatively required that the Judge or officer who made it should also therein and thereby appoint the liquidator, but I was of the opinion, (pp. 289, 290), which I adhere to, that but for the stringent terms of that section the appointment might have been made by means of the ordinary machinery, and in the ordinary course of practice, of the Court through its judicial officer the Master. I think that the order having been made, and the liquidator having been appointed, it is not necessary that all the subsequent proceedings should be carried on by and before the Judge who made it, or some other Judge, but may, as has been done here, be referred by the Judge to the Master to continue and carry them on. Speaking for myself I must say that I do not attach much importance to this objection because, as I construe section 77 it gives (although I think it an inconvenient and undesirable power, and one probably not intended to be given by the Legislature) original jurisdiction to the Master and other officers named in the section as well as to the Judge. The winding-up order having been made the Master may take up the proceedings just as a Judge could do, and the parties are at liberty to carry the order into his office for that purpose, just as they might take it before a Judge. In my view the clause directing the reference, as well as the direction to the Master to adopt in his discretion the proceedings in the former suit so far as they may be deemed applicable, might be struck out of the order without affecting the substantial question for decision, which is whether a winding-up order could be made at all.

Judgment.

OSLER
J.A.

With regard to the costs of the suit of *Clarke v.* this company, the proceedings in which were the foundation of the petition for the winding-up order, I can see no objection to the direction which has now been made for their taxation and payment. By the judgment already pronounced in that suit, (which cannot now be opened or objected to) these costs have been ordered to be paid out of the assets of the company. The order now so much com-

Judgment.

OSLER
J.A.

plained of, and which was complained of on the former appeal, goes no further, and may well be looked upon, as an order for the recovery of such costs, made under section 16 of the Winding-up Act, which forbids any suit, action, or other proceeding to be continued against the company, except with leave of the Court and subject to such terms as the Court imposes.

The proceedings in the *Clarke* suit were stayed by the winding-up order, but the costs thereof may be recovered under the provision made therein for that purpose.

This objection and many, if not most, of the numerous objections set forth in the reasons of appeal, were not (as was stated on the argument of the appeal) raised before the learned Chancellor or upon the settling of the order, and it is a most inconvenient and improper course now to raise them by way of appeal after the order has been issued; several of them were not even argued before us, the learned counsel saying that he insisted upon them as taken and leaving them with the Court. I do not see any which require further notice, and therefore would dismiss the appeal.

HAGARTY C. J. O.:—

I agree. I reserve the right, if the question arise, to decide whether the statute does or does not allow the Master and Deputy Master, to originate proceedings.

MACLENNAN J. A. concurred.

BURTON J. A. :—

I suppose that we ought to assume in the absence of any evidence to the contrary, that the motion for the appointment of the liquidator was duly enlarged from time to time until the order was actually made on the 9th May, 1888.

The notice given was that the appointment would be made on the 20th September, and on that day the matte

was enlarged until the 27th; no further enlargement is shown, but the order recites that the petition was presented on the 27th and 30th September, and again on the 9th May, when the winding-up order was made; and so far as one can judge by a perusal of the proceedings, without any fresh notice to the creditors and contributories. If such was the fact the order would appear to be as objectionable as that formerly made.

Judgment.

BURTON
J.A.

Most of the other objections are really covered by the decision in this Court and the Supreme Court; such for instance as that this was not a company within the provisions of the Act and was not insolvent.

It was not necessary that the insolvency should be established if it was "in liquidation or in process of being wound up" within section 3; and this Court rightly or wrongly decided on the former occasion, that it came within that description.

If it did, then the Court could proceed to make an order that the winding up of such company should thereafter be carried on under the Act. The order is not made in that form, but is founded on the insolvency of the company.

The only serious doubt that I have felt in reference to the validity of this order is that raised by the 12th reason of appeal:

"12th. Because although the powers conferred by 'The Winding-up Act' of the Parliament of Canada upon the Court may be exercised by a single Judge or by the Master or Referee, or by the Master in Ordinary, or by any local Master or Referee, the said Act does not authorize or empower any one of those officials to make an order delegating or referring any matter or thing within his jurisdiction to any other of those officials, and directing what such last mentioned official shall do or cause to be done in respect thereof, yet the winding-up order herein contains references and directions by the learned Judge to the Master in Ordinary who has co-ordinate jurisdiction with him in the exercise of all powers conferred by the said Act

Judgment.

BURTON
J.A.

upon the Court, and outside of the Act, neither the Court nor the learned Judge nor the Master in Ordinary have any jurisdiction whatever in the premises. See sec. 77."

I take it to be quite clear that the Master in Ordinary could under section 77 have made the winding-up order and appointed the liquidator, and even if the order had been made by one of the Judges of the High Court, any other Judge, or the Master, might upon application have settled the list of contributories.

It is, perhaps, the best way to consider the case, as it would have stood before the alterations effected by the 47 Vic. ch. 39. Here was a Dominion Court established for the first time. The judicial functions thus called into existence might have been performed by any persons named in the Act. They have authorized the existing High Court of Justice to perform those functions, and, subject to an appeal to a Judge according to the ordinary practice, power was given to the Master in Chambers to exercise the same power as the Court.

Now I take it to be well settled that neither a Court, nor an individual clothed with judicial functions, can delegate the discharge of those functions to another unless he be expressly empowered to do so, the rule being that whilst a ministerial officer may appoint a deputy a judicial officer cannot.

This being the well understood rule it is not surprising to find that in the English Winding-up Act of 1848 particular care is taken, where a reference of any kind is intended to be given, to do so in express terms.

Thus whilst the Court alone could make the winding-up order, it was authorized, if further enquiry became necessary, to refer it to the Master to make those preliminary enquiries, and upon the coming in of the Master's report the Court proceeded to make or refuse the order.

Then again after the Court had made the order it was authorized to refer it to one of the Masters to proceed with the winding up of the affairs of the company, and wherever the Master is the party to do the act the authority is expressly given.

Four years after the passing of that Act the office of Master was abolished, and the duties were required to be performed by a Judge sitting in Chambers.

Judgment.

BURTON
J.A.

The orders so made by the Judge were to be drawn up by their respective clerks to be appointed under the Act, but the Judge was given power to direct them to be drawn up by the registrar of the Court in like manner as orders made in Court.

Power is then expressly given to the Judges to define what matters may be investigated by themselves and what by their chief clerks.

In this state of the law one of the chief clerks appointed a person to be official manager, and refused to adjourn the matter for the consideration of the Judge personally, and the Judge, on appeal, refused to disturb the appointment, but on further appeal to the Lord Justices they set aside the order.

It was admitted by the appellants there that if the power could be delegated they had no *locus standi*, as there was no objection to the fitness of the person appointed, but there being no power expressly to delegate, although it was the practice of the Master of the Rolls to delegate such matters to his chief clerk, it was contended that it was *ultra vires*, and so held.

And a very strong case to the same effect was decided by the Court of Appeal in England.

In that case, *Re Great Southern Mysore Gold Mining Co.*, 48 L. T. N. S. 11, the matter came up in Chambers before Chitty, J. with reference to the appointment of the official liquidator. Two persons had been named there, each supported by a large number of shareholders, and the Judge was not satisfied that either of them should be appointed.

The managing clerk of the solicitors of a gentleman whom the Judge considered an independent shareholder appeared, and the Judge being of opinion that it would be the best thing for the Court to appoint the nominee of this gentleman, gave a direction to his chief clerk that, provided the person so selected proved to be impartial,

Judgment.

BURTON
J.A.

competent, and wholly unconnected with the company, he would be the right person to be appointed; a person was so named, and after notice to the shareholders, the chief clerk appointed him.

The petitioner then moved before Chitty, J., to discharge the order made by the chief clerk; but Chitty, J., stated that he approved of what had been done by himself and the chief clerk; and that he himself had exercised carefully and personally his discretion in the matter, and refused the motion with costs.

The petitioners then appealed to the Court of Appeal.

Jessel, M. R., in delivering judgment, after expressing his regret in being compelled to allow the appeal, said, "It is like the appointment of a trustee being delegated by a person, subject to the condition that a fit person shall be nominated. Chitty, J., tells us himself that he directed the chief clerk to appoint the person nominated, provided he was a fit person. He cannot do that, he cannot delegate to any one the appointment of a liquidator."

Cotton, L. J., concurred.

There the liquidator prepares the list and leaves it with the Judge, who, upon notice to the parties, settles it, and application was made to continue the appointment of the liquidator until the new one was appointed,—alleging that he was settling the list,—but even this was refused, the Court saying that they could go to the Judge the following morning and ask for the appointment of an interim liquidator.

I do not for a moment question that it might have been better and more in accordance with the practice of at least one Division of the High Court, instead of giving co-ordinate jurisdiction to the officials named in section 77, to have given power to refer certain matters to them for decision, but there is nothing in the section itself which is susceptible of such interpretation, and no such meaning is to be derived from any other sections of the Act.

There are many matters as to which the Court probably has an inherent right to refer to an officer of the Court for

enquiry and report, but a power of this kind is not of that nature.

Judgment.

BURTON
J.A.

It would have been, I think, very clumsy legislation to have conferred the powers upon the Judges, similar to those already exercised by them in their own existing tribunals, of referring any of the matters entrusted to them to their officer for adjudication.

All I suggest is that it has not been done, and even if it had been, the matters now in question are not of a similar character to those which the High Court is in the habit of referring.

The powers thus exercised by the Court of Chancery of referring matters to the Master in Chancery are based partly on statute and partly on rules of Court, and are very different in character from what is in question here, which involves the substitution of the judicial decision of a third party for that of the Judge. I speak, of course, of the Act as it stood originally. I am quite free to admit that it is now of very little importance except that we are face to face with the question of whether under this particular statute the power to delegate the authority is given.

Under Rule 306 the Court can order that parties interested in the equity of redemption may be made parties in the Master's office upon such terms as the Court thinks fit, but only in cases where some parties interested in the equity of redemption are already before the Court.

I am not aware that the Master has any power to add as a party to the litigation any debtor to the estate, nor where a creditor files a claim which is met by a set-off, can he do more than dismiss the creditor's claim.

As Master, under his ordinary jurisdiction, I am not aware that he could issue any process against a person who is alleged to be a debtor to the estate which the Court is administering.

Creditors who voluntarily come in in administration suits can be dealt with and made parties.

But in all these cases no analogy can be found to the present proceeding, which is in effect delegating a power to the Master to fix with liability persons not before the Court except by his judgment.

Judgment.

BURTON
J.A.

My objection, however, is that no such powers even, as the Court of Chancery possesses, are given in this Act either expressly or by implication, and the question therefore, of whether they are of a cognate character to those exercised by that Court does not arise, and as to the limited character of a reference to the Master, even in Chancery, I refer to Mr. Justice Strong's remarks in *Bickford v. The Grand Junction R. W. Co.*, 1 S. C. R. 696, at p. 726.

I am not overlooking the circumstance that the question involved in this case, becomes of comparatively little importance, inasmuch as the Master in Ordinary is invested with original jurisdiction to do the very thing which is the subject of this reference; and if it were simply a reference not clogged with a condition, I should have felt less difficulty than I do now in letting that part of this order which directs it stand, although, in my view, such a reference is unauthorized and void. If the Master had proceeded to settle the list of contributories, I think his act might be sustained as referable to his original jurisdiction, and not to the attempted delegated authority.

The 6th paragraph of the order lays down a direction to the Master as to the evidence taken in the former suit, which may, or may not, be fair and reasonable; but the Master ought to have been the judge of that; and this is open to the further objection that it is very doubtful whether in the case of *Clarke v. The Union Fire Insurance Co.*, any power existed to settle a list of contributories.

With much hesitation and regret, I think that the order in this form was not warranted.

It is very unfortunate if this long protracted litigation should be further delayed by an appeal upon this point; and if my learned brothers could see their way to vary the order by striking out so much of it as relates to the reference, I should be prepared to uphold the winding up order and dismiss the appeal.

Appeal dismissed with costs, BURTON, J.A., dissenting.

THOMPSON V. ROBINSON.

*Solicitor and client—Negligence of solicitor in making investments—
Liability of partner—Practice.*

R., a practising solicitor, was retained by the plaintiff to manage her business affairs, and he obtained from her and invested large sums of money in mortgage securities. A year afterwards R. entered into partnership with the defendant W. and the firm carried on business as solicitors and conveyancers and had in their hands several estates to manage. It was agreed when this partnership was formed that W. should have no interest in the plaintiff's business which continued to be managed entirely by R., but the entries in connection therewith were made in the books of the firm, moneys received on the plaintiff's account were deposited with the firm's moneys, and from time to time re-invested by the firm, or paid to the plaintiff or to R. by cheques of the firm, and charges paid by borrowers went into the profits of the firm. Losses occurred owing to the insufficient value of some of the mortgaged properties.

Held, [BURTON, J. A., dissenting,] affirming the judgment of the Queen's Bench Division, and that of BOYD, C. at the trial, that under the circumstances, particularly because of the money having been actually received by the firm, and again paid out by them to the borrowers, both partners were liable for the negligence complained of.

Per HAGARTY C. J. O. The business being *prima facie* within the scope of the partnership business, W. was liable and to escape liability he should, when the partnership was formed, have given notice to the plaintiff that he was not to be liable.

Per BURTON, J. A. R. alone was retained by the plaintiff, and as it was a term of the partnership that W. was to have no interest in the plaintiff's business, there was no duty cast upon him to give notice to her. Any liability to her could arise only by estoppel, and there was nothing amounting to estoppel in this case.

During the partnership, the plaintiff, acting on R's. advice, allowed him to invest moneys in the purchase of lands in Dakota, it being agreed that he was to pay her interest on the moneys so invested, and that any profits were to be divided between the plaintiff and R. W. had no knowledge of this transaction. The moneys so invested were lost.

Held, reversing the judgment of the Queen's Bench Division, and affirming that of BOYD, C. at the trial, that this was a transaction clearly outside the scope of the partnership business, and that W. was not liable.

The formal judgment or order appealed from should be printed in the appeal book.

THIS was an appeal from the judgment of the Queen's Bench Division. Statement.

One Robinson, a solicitor practising in the town of Chatham, was retained by the plaintiff in the year 1877 to manage her business affairs. Her husband had died intestate shortly before this time, leaving property amounting in value to about thirteen thousand dollars. Robinson took out for her letters of administration to her husband's

Statement. estate, and then received from her the estate moneys which he invested for her in mortgage securities. Subsequently, in the year 1878, Robinson and the defendant Wilson entered into partnership as solicitors, and continued in partnership and carried on business as solicitors and conveyancers until a short time before the bringing of this action, having, as a firm, several estates to manage, and investing and re-investing moneys for their clients. It was agreed, when the partnership was formed, that Wilson was to have nothing to do with the estates, including that of the plaintiff, then being managed by Robinson, and after the formation of the partnership the plaintiff continued to consult Robinson, and refused to have anything to do with Wilson. Moneys received on her account, and in one instance from her, were, however, credited to her in the books of the firm, were deposited with the firm's moneys in their bank account, and were then generally paid out by the firm's cheques to Robinson who reinvested them, or made payments to the plaintiff. In some instances payments were made to the plaintiff herself, and to borrowers, by the firm cheques; and in one or two cases securities were taken in the name of Wilson as trustee. The plaintiff was not charged, either before or after the formation of the partnership, with any commission; but all conveying charges paid by borrowers, and the costs of enforcing securities went into the general profits of the firm. About the year 1883, Robinson advised the plaintiff to allow him to invest her moneys in the purchase of lands in the Territory of Dakota, and she consented to this being done, it being agreed that Robinson should pay her interest at the rate of eight per cent. per annum on all moneys so invested; and that when the lands were sold, any profits realized should be divided between the plaintiff and himself. As the plaintiff's moneys fell in after this they were paid over to Robinson and by him applied in this way. Wilson had no knowledge whatever of this transaction. Nearly all the moneys were invested in Dakota lands and lost, only two or three mortgage securities remaining out-

standing, and these were of little value. Robinson then **Statement** became insolvent and the partnership was dissolved, and the plaintiff brought this action seeking to make Robinson and Wilson jointly and severally liable for the losses incurred in respect of the Dakota investment, and in respect of the unrealized mortgages.

Pending the action, Robinson made an assignment to trustees for the benefit of his creditors, and shortly afterwards died. The trustees were made parties to the action, which came on for trial before BOYD C., at Chatham, on the 18th day of May, 1887, when judgment was given in favour of the plaintiff against the estate of Robinson on both branches of the case, and in favour of the plaintiff as against Wilson, as far as the mortgage securities were concerned, but Wilson was held not to be liable in respect of the Dakota investment.

On appeal by the plaintiff, the Queen's Bench Division held that Wilson was liable also in respect of the Dakota investment, and dismissed a cross-appeal by Wilson, who sought to wholly escape liability. See 15 O. R. 662. From this judgment Wilson appealed, and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.) on the 22nd and 23rd days of January, 1889.

Moss, Q. C., for the appellant Wilson.

Osler, Q. C., *Douglas*, Q. C., and *Aytoun-Finlay*, for the respondent, the plaintiff.

M. Wilson, for the trustees of Robinson.

March 5th, 1889. HAGARTY C. J. O.:—

I do not see on what principle the defendant Wilson can be held responsible for any loss attending the investment of the plaintiff's moneys in the Dakota lands. When the money was withdrawn from the firm, or realized from the securities there held, it was, by the plaintiff's express consent and

udgment.

HAGARTY
C.J.O.

arrangement with Robinson, invested from time to time in this unfortunate speculation. It was a wholly personal and private arrangement and bargain between her and Robinson, the latter was to give her eight per cent. interest on the money, and they were to divide the anticipated profits; Wilson neither knew nor approved of any such arrangement. If Wilson had personally handed the money received from the mortgagors to the plaintiff, and she chose to make this arrangement with Robinson it is not easy to understand how a partner of the latter could possibly be responsible therefor. When the moneys passed from the firm, and were paid to the plaintiff all responsibility therefor must cease.

It matters not to my mind whether one or the other partner applied the money on the plaintiff's direction, and to some purpose sanctioned by her; if a purely personal matter between her and the acting partner, all agency or authority from the other (as partner) would cease, and so would all responsibility for the result of any such arrangement. To me the Dakota land matter refers merely to a joint speculation between the plaintiff and Robinson in the application of the moneys of the plaintiff which had been in the hands of the firm, but had been paid over by them, and employed by her in a speculation in joint account with Robinson. That it was a most unwise and unfortunate proceeding on the part of a legal adviser to suggest, or to be a party to such an investment of the moneys of the plaintiff, and her child, can admit of no doubt. But there seems to me no ground for attaching any liability to any other than the person with whom she embarked in this joint adventure.

I think the decree of the Chancellor is right, and ought to be restored.

I think the plaintiff is entitled to an account as is directed. It may result in little, if any, substantial advantage to her.

The question of the Statute of Limitations will be raised, and the facts as to any item or items to which it is applied, will be reported to the Court.

I fully agree with the manner in which the learned Chancellor has dealt with the question of Mr. Wilson's liability to account, and I need not repeat his views as they express my own.

Judgment.

HAGARTY
C.J.O.

I think it impossible for any firm of solicitors to avoid individual as well as collective liability to a plaintiff under the circumstances here disclosed.

I need not go beyond the case of *Cleather v. Twisden*, 28 Ch. D. 340, for a clear statement of the law. I especially refer to the judgment of Bowen, L. J., who, after noticing the relation of the partners to each other, and the fraud committed by the one partner without the other's knowledge or assent, adds, "We must enquire, first, whether they gave him express authority to take charge of the bonds; (which he misappropriated) secondly, if not, whether they ratified what he did; and, thirdly, if they neither expressly authorized nor ratified his acts, whether they consented that he should have general authority to act without their knowing what he did. For it is not enough for a principal to shew that he did not know what his agent was doing, for he may have consented to leave the matter in his agent's hands. In ninety-nine cases out of a hundred, partners do not know what their partner does in any particular business, because they have consented not to know."

The Chancellor fully dealt with this part of the case.

It was suggested on the argument that Robinson was the plaintiff's trustee, and that all that was done was giving the firm the benefit of the conveyancing and other charges connected with the investment of her moneys, and the costs of suing for the amounts and selling under her mortgages; that in effect, the firm was acting for him as such trustee. If so, he would be the client and the firm his solicitors, and the accounts would be properly kept with him, and all the dealings would then be between him and the plaintiff. But the evidence discloses a wholly different state of proceedings; and, as I think, brings the case clearly within that of the plaintiff's business in investing her moneys, being that of the ordinary case of client and solicitors.

Judgment.

HAGARTY
C.J.O.

For a year after her husband's death, Robinson acted as her solicitor.

He then becomes partner with Wilson, and her business appears as conducted in the ordinary way in the books of the firm, and all legal charges go into the profits of the firm. No charge against her for investing her money was made by Robinson when alone or by the firm afterwards.

I do not consider it of any importance on the question of liability, that she always, as she says, looked to Robinson to advise her, and rarely if ever spoke to Wilson, against whom it seems she had some dislike.

I think with the Chancellor that when the partnership was formed, the duty devolved on Wilson to accept the responsibility "unless he gave express warning that he was not to be liable."

OSLER J. A. :—

I think that the judgment of the Chancellor at the trial ought to be restored. It was properly found upon the evidence that the business of receiving and making investments of moneys for clients was within the scope of the ordinary business of their partnership as carried on by these defendants, though it is hardly necessary to go so far as to hold that, for the question here is, not whether both members of the firm shall be charged upon the receipt of the plaintiff's money by one of them only, for a purpose within the scope of their ordinary business, but, whether the defendants have discharged themselves from their undoubted liability to the plaintiff in respect of money which the firm actually, and not merely constructively, received. The onus of proving such discharge rests upon them.

In *Harman v. Johnson*, 2 E. & B. 61, it is laid down that the receipt of money by one of a firm of attorneys from a client, professedly on behalf of the firm, for the general purpose of investing it as soon as he can meet with a good security, is not an act within the scope of the ordinary business of an attorney so as, without further proof of

authority from his partners, to render them liable to account for the money so deposited ; such a transaction being part of the business of a scrivener and attorneys as such not being necessarily scriveners. But if money be deposited with one partner for the purpose of its being invested on a particular security the other partners are liable to account for it, such a transaction coming within the ordinary business of an attorney.

Judgment.

OSLER
J.A.

Crompton, J., said : " Attorneys may often become liable for similar acts of their partners where the partnership is in the habit of carrying on business by what you may call a general commission, but they do not generally act under such a general commission."

The law as laid down in this case has been approved in subsequent cases, and I see no reason for thinking that the rule is not the same in this country, but it fails of application to the case at bar, and it is evident that in *Harman v. Johnson*, the decision would have been different had the plaintiff's funds actually reached the hands of the firm instead of being misapplied by the partner who received them.

In *Plumer v. Gregory*, L. R. 18 Eq. 621, the plaintiff sought to make the estate of a deceased member of a firm of attorneys liable for a sum of £1700, which had been received by his partner. for the purpose, not of being advanced upon a specific security, but of investing it when a satisfactory security should offer. The partner who received it misappropriated it. It was held that the dealing with the money was not part of the regular business of the firm as solicitors, and that the receipt of or by one partner alone did not make the other partner liable, and therefore that his estate was not liable to replace the fund.

Malins, V.C., refers to a number of authorities, among others to *Bourdillon v. Roche*, 27 L. J. Ch. 681, quoting an observation of Wood, V.C., in that case : " There was nothing whatever in the partnership books relating to the transaction, nor anything by which Plowman (one of the solicitor defendants) was bound to know of the receipt of

Judgment.

OSLER
J.A.

the money by Roche (his partner) as a matter of business." Then he goes on to point out that the plaintiff's loss was due to her negligence and want of prudence in not taking the ordinary course in business, and making some communication to James Gregory (the other partner), or enquiring at all events *if the money had gone into the partnership books.*

Another passage from the same judgment may be quoted as applying to the liability of both defendants had the case turned upon the receipt of the money by the defendant Robinson alone in the first instance: "If the firm had been employed to prepare the securities for the plaintiff (because in that case the firm would have had the business transactions, and it would have appeared in their books) a payment of money to one of the partners would have been a payment to both because it would then have been received for the purpose of being invested upon specific security within the meaning of these decisions." Here the firm actually did prepare the securities, and so the moneys from time to time became devoted or applicable to the specific securities so prepared.

I refer also to Lindley on Partnership, 5th ed., pp. 150 152; *Blair v. Bromley*, 5 Ha. 542, 2 Ph. 354; *De Ribeyre v. Barclay*, 23 Beav. 107; *Eager v. Barnes*, 31 Beav. 579; *Cleather v. Twisden*, 28 Ch. D. 340, upon which case Lord Justice Lindley, in the last edition of his book, makes the following observation:

"The decision would have been the other way if it had been proved that the innocent partners had in fact known that the bonds were in the custody of their co-partner as representing the firm. Had such knowledge been proved, they would have been held to have had the bonds in their own custody, and would have been liable for them"

In the present case, we are, as I have said, not obliged to consider the defendant Wilson's liability as turning upon the receipt of the plaintiff's money by his partner Robinson, for the money was actually, not constructively, received by the firm, entered in their books, carried to

their credit in their bank account, from time to time invested, and when repaid by the borrowers to the firm for the plaintiff, re-invested ; the advances being made by the firm's cheques to the borrowers, and the securities on which the investments were made, prepared by the firm, entered in the firm's books, and charges made against the plaintiff in connection therewith, when they were not paid by the borrowers.

Judgment.

OSLER
J.A.

This is the state of facts disclosed by the account of the defendants against the plaintiff as entered in their books, extending from November, 1878, to December, 1882, where no fewer than sixteen investments may be found entered, including those relating to the loss, upon which an enquiry was directed by the judgment of the Chancellor.

In the same account we find an entry of money "received for investment," apparently not being money repaid by a borrower, but money received from the plaintiff in the first instance; either directly or through Robinson. Under these circumstances, I cannot accede to the contention that the firm were merely acting as Robinson's bankers, he being, as it were, the plaintiff's trustee or agent to make the investment; that at all events is not the shape which the business assumed, and I think it impossible to say that the learned Chancellor drew a wrong inference from the evidence which is furnished by the books of the firm on this point for a series of years. The defendant Robinson no doubt had the special confidence of the plaintiff, but I think the evidence does not go far enough to warrant us in saying that she so lent herself to him, as it has been said, to the exclusion of the other partner, as to preclude her from enforcing liability upon both members of the firm which received and paid away her money upon the investments in question.

The learned Chancellor has very clearly pointed out the distinction between the transactions I have been describing, for which both members of the firm must be held responsible, and that relating to the Dakota lands. The plaintiff was herself a party to that transaction, sanctioning the

Judgment.

OSLER
J.A.

investment by Robinson and his application of her money therein. Regarding it from the defendant Wilson's standpoint alone, it was made a matter of speculation entirely between Robinson and herself; Wilson being kept in ignorance of it and excluded from all participation therein, and from any opportunity of controlling or advising in respect of it.

The moneys so invested were "at home," so to speak, when applied in an investment which the plaintiff herself sanctioned, which Wilson was ignorant of and which never appeared in the books. As regards Robinson's liability for it, I think the evidence supports the view of the trial Judge rather than that of the Court *a quo*, and the plaintiff appearing to have sanctioned it from the first, before any of her money had been put into it, is not in a position to complain of it in this action.

I therefore think that the extent of the firm's responsibility was rightly defined by the judgment at the trial, and that the judgment appealed from should be varied accordingly.

As the appellant has partly succeeded and partly failed, there should be no costs of the appeal.

We desire to call attention to the omission from the appeal book of the formal judgment or order not only of the Chancellor at the trial, but also of the Queen's Bench Division. It is the judgment of the Court, that is, the judgment as formally expressed, drawn up, and entered, which is the subject of appeal, and not the reasons on which it is founded.

The omission is one which has of late frequently occurred, and litigants will do well to see that in future the judgment they appeal from is inserted in its proper place when settling the appeal case. In this instance the judgment was procured from the registrar of the Queen's Bench Division, and it is only necessary to say that if the appeal had been dismissed, the plaintiff might have found that, as drawn up, it would probably not have been of much use to her.

MACLENNAN J. A. concurred.

BURTON J. A. :—

Judgment.

BURTON
J.A.

This is an action seeking to make liable the surviving member of a firm of solicitors jointly with the representatives of the deceased partner for a sum of money entrusted to the deceased by the plaintiff prior to the formation of the partnership. The whole of the moneys, with two exceptions to which I shall have occasion presently to refer, were invested in lands in Dakota, and as to this investment the learned Chancellor held, and I think properly held, that it was a private speculation between the plaintiff and the deceased not within the ordinary scope of the business of a firm of solicitors ; but that as to the other moneys, as they were in Robinson's hands for investment and re-investment at the time the defendant Wilson went into partnership with him, he could only avoid responsibility by giving express warning to the plaintiff that he was not to be liable

On appeal to the Divisional Court this ruling was upheld, but that Court further held that the firm were responsible for the investment in the Dakota lands.

I see no reason for holding that there is any difference between the law here and in England as to what comes within the ordinary scope of the business of solicitors; and I think the law is well stated in two of the cases which were cited at the bar, the first being *Harman v. Johnson*, 2 E. & B. 61, where it is laid down that the receipt of money by one of a firm of attorneys from a client, professedly on behalf of the firm, for the general purpose of investing it as soon as he can meet with a good security, is not an act within the scope of the ordinary business of an attorney, so as, without further proof of authority from his partners, to render them liable to account for the money so deposited ; such a transaction being part of the business of a scrivener, and not of an attorney, and attorneys as such not necessarily being scriveners. But I add in the words of Lord Justice Baggallay, that though the law may be so stated, no one will deny that a course of conduct may be pursued which may convert the act of a partner, for

Judgment.

BURTON
J.A.

which the other members of the firm would not be otherwise liable, into one for which they will be responsible.

On the other hand where, as in the case of *Dundonald v. Masterman*, L. R. 7 Eq. 504, money has been received by one member of a firm of solicitors in the course of the management and settlement of the affairs of a client of the firm, such is money paid to the firm in the course of their professional business, and consequently the members of the firm are liable to make good any loss occasioned by the negligence or dishonesty of the parties by whom such money was received.

From what I have said, it may be seen that I do not agree in the view taken by the learned Chancellor, that in order to escape liability, it was incumbent upon Wilson to give notice to the plaintiff that he would not be liable. He can be liable only on the ground that the actual agreement of partnership embraced transactions of this nature, or that he so conducted himself as to lead the plaintiff to believe that he was a partner in point of fact.

That he was not so in fact is not disputed ; the evidence is all one way ; we are not driven to enquire whether the rule which prevails in England prevails here also, because the undisputed evidence shows that on the formation of the partnership, business of this character was specially excluded ; that being so it is manifest that there was no onus on Mr. Wilson to give any notice.

Mr. Robinson at that time had charge of several estates, this among others, and it was stipulated that these should remain in his hands, Wilson having no interest in the investments or commissions, if any, derived from such investments.

Then what evidence is there of a holding out ?

It is said that, although in the inception of the business, transactions of this kind were excluded, yet in the course of time some clients and some relations of Mr. Wilson deposited money with the firm which they undertook to invest.

But that, in itself, cannot assist the plaintiff. It is clear that she employed Robinson and Robinson alone as

her steward or agent to invest her moneys, and she never did in point of fact retain or engage Wilson.

Judgment.

BURTON
J.A.

I do not for a moment dispute the point that if Robinson and Wilson were at the time of the retainer carrying on this description of business as partners, the mere fact that the plaintiff communicated exclusively with one member of the firm, or even refused positively to have anything to do with the other member, would not relieve them from responsibility ; and I quite agree that in such a case she would not have been bound by any secret agreement between the partners.

The difference between such a case and the present is, that the only retainer proved is that of Robinson, and we have the admissions of the plaintiff herself supported by the uncontradicted evidence of Robinson and Wilson, that she desired that Wilson should have nothing to do with her affairs.

The question, therefore, resolves itself into one of estoppel.

One of the grounds mainly relied upon in support of this branch of the case was, that moneys received from time to time from the plaintiff's securities were carried into the firm's bank account until withdrawn by Robinson, (necessarily by a cheque of the firm), either for the purpose of deposit to Mrs. Thompson's credit in the bank, or for reinvestment. There is nothing to shew that the firm used these funds, or that the plaintiff knew anything of it, except that on one occasion an account was rendered in the firm's name, but it is shown that this was an isolated transaction, and it must be taken in connection with the plaintiff's express instructions that Wilson should have nothing whatever to do with her affairs.

A great deal more weight was attempted to be given to this circumstance than in my opinion it deserves. It would be rather alarming if a firm of solicitors, one of whom might be a trustee under a marriage settlement, and who might be constantly receiving trust funds for reinvestment, should be held responsible for the loss of some

Judgment.

BURTON
J.A.

of the investments made by their partner, from the mere circumstance that the moneys so received were, until re-invested, deposited in a bank with the firm's own funds, and the particulars entered in the firm's books.

I can well understand that, if while in their hands it had been misapplied, the whole of the partners would be liable; *Blair v. Bromley*. 2 Ph. 354, and *St. Aubyn v. Smart*, L. R. 3 Ch. 646, were cases of that description, but there is a marked difference between these cases and the present. Here all the moneys so placed in the bank were paid over to Robinson and invested by him.

The argument as to the charges for conveyancing is entitled even to less consideration. What more natural in the case to which I have just referred, than that the trustee member of the firm should give to his partners the benefit of any business connected with the investigation of the title and the preparation and registration of the securities taken by him as trustee; but it would be a strange result if that should be held to make them responsible for the misapplication of any of those securities by the trustee, or the insufficiency of the land or other property on which the money was invested.

As regards the only two mortgages now outstanding, I have searched in vain for any evidence to fix the defendant Wilson with liability; it may be quite true that Robinson may, in regard to those transactions, have incurred a personal liability to make good the amounts, but there is nothing to connect his partner with them.

I not only agree with the Chancellor as to the investment in the Dakota lands, but I should have felt myself bound as to them by his finding upon the facts "that it was a matter of private dealing between these two in respect of which one trusted the other, and one looked to the other and to no one else."

On the whole I think it is impossible to say there was any holding out on the part of Wilson, or any conduct or his, on which the plaintiff was entitled to rely, nor any representation by words or conduct on which she did rely;

on the contrary it is shown by her own admissions that the retainer or engagement of Robinson was the only retainer given or intended to be given.

Judgment.
BURTON
J.A.

I need only refer to the following extracts from her evidence. After stating that she entrusted the moneys to Robinson before the partnership, she adds :

" And since I entrusted them to him I have never altered my instructions or directions to him in any way or given any new instructions or directions in regard to my moneys and I have certainly never spoken to defendant Wilson about them in any way, and I never made any new agreement with Robinson or the firm about the moneys or the mortgages in any way."

and again :

" I never spoke to or consulted Mr. Wilson, the defendant herein, about any matter of business whatever—I never in my life paid money to defendant Wilson or received money from him—or ever gave cheques to him—or received them from him—in short I had no business communication with defendant Wilson whatever. At the time I placed my affairs in Robinson's hands I don't think I knew defendant Wilson at all. I certainly knew at all events then that defendant Wilson was not in partnership with Robinson."

She does, indeed, say in one place, "I supposed that when the defendant Wilson went into partnership, that my account would go into the firm, and I supposed that my money would be invested by the firm," which is not very consistent with the injunctions so frequently given to Robinson not to allow his partner to have any thing to do with her affairs, and is insufficient to create a legal liability. But I think the true secret of her attempt now to make the other member of the firm liable, is to be found in Robinson's insolvency, and the following very significant piece of evidence :

" Both Mr. Ireland and Mr. Douglas told me that they thought the firm was responsible for moneys paid out, and it is in consequence of them telling me that the firm was

Judgment.

BURTON
J.A.

liable that I seek to charge defendant Wilson in this suit Ireland told me this before I wrote to Smith. Some time before this last winter Ireland told me that. I have no idea or supposition that defendant Wilson has profited by my moneys."

The evidence of Mr. Bell does not carry the matter any further than the books themselves; he was not aware of the nature of the partnership agreement, and he shows no participation by Wilson in the management of this estate; his evidence is quite consistent with that of both the partners.

The entries in the books, if unexplained, would, I admit have established a *prima facie* case against Wilson, but they have been satisfactorily explained by undisputed evidence upon the truth of which not a shadow of doubt has been cast; and the learned Chancellor proceeded entirely upon his view of the law—namely, that when Wilson joined the firm, he was bound to give notice to the plaintiff that he would not be responsible, a view of the law from which I venture, with all respect, to dissent.

The plaintiff then has failed to satisfy the onus that was upon her of showing a retainer of the defendant Wilson to act for her in the management of her affairs. He never did so act in point of fact, and he has done nothing to estop himself from asserting the true facts.

I am of opinion therefore that the appeal should be allowed, and the action as to him dismissed with costs.

Appeal allowed in part, and, BURTON, J. A., dissenting, dismissed in part.

POTTS V. BOIVINE.

Will—Cujus est solum ejus est usque ad coelum.

A testatrix, being the owner of certain lands and premises upon which a block of buildings was erected, devised the property in two parcels, describing the buildings thereon as being in the occupation of certain tenants. The description of one parcel included an alley-way running through the centre of the block, but the rooms built over the arch of the alley-way were structurally a part of, and were used with, a store that formed part of the other parcel, to which a right of way over the alley-way was given.

Held, BURTON, J. A., dissenting, affirming the judgment of the Common Pleas Division, that the presumption "*Cujus est solum ejus est usque ad coelum*" is a rebuttable one and that under the circumstances the rooms in question did not pass with the land.

THIS was an appeal by the plaintiff from the judgment Statement of the Common Pleas Division.

The action was brought to recover possession of a portion of a house built over an archway. The question arose under the will and codicil thereto of one Mary Whiteford. The testatrix was the owner at the time of her death of a certain piece of property in the city of Belleville, upon which a block of four buildings was erected. The three southerly buildings of the block were used as stores, and the northerly building as an hotel. Between the hotel and the most northerly of the three stores there was an archway for the use of the tenants of the several buildings in the block. The first floor of the most northerly store was carried across the archway from the store to the hotel, and the rooms over the archway formed a portion of, and were used with, the northerly store, and at the time the will was made and at the time it took effect, were occupied by the defendant Thomas Lockerty in the will mentioned. There was a partition wall between these rooms and the hotel.

The parts of the will and codicil in question are as follows, the first devise being in the will, and the second in the codicil, and the plaintiff claiming under the second devise :—

I will devise and bequeath to Caroline Boivine, of St. Hyacinth, widow, and to her heirs and assigns for ever, subject to the charges and reservations herein charged, and made in this my will, that certain messuage

Statement.

lands and premises situate on the west side of Front street, in the city of Belleville, lying next above or north of the property hereinbefore devised to Elizabeth L'Esperance, and which is now occupied by Thomas Lockerty, measuring from the north-east corner of said lot devised to said Elizabeth L'Esperance, nineteen feet more or less frontage on said Front street, thence westerly in a straight line to the river Moira, also the land lying in rear of said store to the river Moira, together with all the buildings and erections thereon, together with right of way and free use of gangway leading to or from Front street as now used in common with the owner or tenants of the property formerly owned by the late James Whiteford, which gangway is between the premises devised to said Caroline Boivine, and the property devised by me in this my will to William A. J. Whiteford, reserving thereout and therefrom a right of way across said lands to the lands and premises hereinbefore devised by me to Elizabeth L'Esperance and James William Whiteford, and now used and enjoyed by me and the tenants of said premises.

* * * * *

I will and devise unto James William Whiteford, of the city of Winnipeg in the Province of Manitoba, formerly of the city of Ottawa in the Province of Ontario, physician, and to his heirs and assigns for ever, all that certain messuage lands and premises situated on the west side of Front street, in the city of Belleville, lying next above north of the property devised in said will to Caroline Boivine, and which said property is now occupied by one Daniel Coyle as an hotel, measuring thirty-three feet and six inches more or less frontage on Front street, measuring from the south side of the gangway leading from Front street to the rear of said land between land devised in my said will to Caroline Boivine, and this property devised to said James William Whiteford, and the south-east corner of land owned and occupied by S. B. Smith, Esquire, to include all the land between those two points on Front street and the river Moira, also the land lying north of said lot and south and west of the land owned by said Samuel B. Smith to the river Moira, together with all the buildings thereon. This bequest is intended to convey all the land owned by me or the late James Whiteford lying north of the north side line of land in my said will devised to Caroline Boivine, and north of a straight line produced to the river Moira, running westerly along the north side of said land devised to said Caroline Boivine from west side of Front street to said river Moira, which said lands are those devised to William A. J. Whiteford in the twentieth paragraph of my last said will, which paragraph is by this codicil revoked; subject to the following reservations and charges, reserving free use of gangway and right of way as now enjoyed by me and my tenants for ingress and egress to lands and premises in my said will devised to Caroline Boivine, Elizabeth L'Esperance, and James Whiteford, and each of their heirs executors and assigns, and charged with the payment of one thousand dollars to William A. J. Whiteford, of the city of Montreal, in the Province of Quebec, and with the payment of one hundred and fifty dollars to Mary Esther Holden, as more particularly set forth in the devise to each of them.

The action was tried before ARMOUR, C.J., at Belleville, *Statement.* at the Spring Assizes of 1888, and on the 10th day of May, 1888, judgment was given in favour of the defendants, holding that the rooms above the archway passed under the will with the northerly store, and not as part of the hotel property, and the action was dismissed with costs.

The plaintiff moved to set aside this judgment before the Divisional Court of the Common Pleas Division, and on the 29th day of June, 1888, judgment was delivered dismissing the motion with costs. See 16 O. R. 152.

From this judgment this appeal was brought, and came on to be heard before this Court (HAGARTY C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.) on the 24th day of January, 1889.

G. D. Dickson, Q. C., and *S. B. Burdett*, for the appellant. The fee of the soil in the gangway according to the will is in the plaintiff, and all above the soil becomes likewise vested in him, subject to the right of way only: *Doe dem Smith v. Gallaway*, 5 B. & Ad. 43; *Gillen v. Hynes*, 33 U. C. R. 516; *Wilson v. Graham*, 12 O. R. 469. Where two claims in a will are inconsistent, the latter prevails: *Crone v. Odell*, 1 B. & B. 449; *Ulrich v. Litchfield*, 2 Atk. 372.

W. B. Northrup, for the respondents. The presumption "*Cujus est solum ejus est usque ad coelum*," is not of universal application, and may be rebutted by the circumstances under which a deed or will is executed, or by the nature of the property: *Doe d. Freeland v. Burt*, 1 T. R. 701; *Fay v. Prentice*, 1 C. B. 828; *Duke of Devonshire v. Pattinson*, 20 Q. B. D. 263. The property devised to the plaintiff's grantor was the hotel occupied by Coyle, while that devised to the defendant Boivine was the building occupied by the defendant Lockerty, including the rooms in question, and in each devise the further description by metes and bounds may be rejected, the subject of the devise being clear: *Jarman on Wills*, 5th Am. ed., 790; *Re Sharer*, 6 O. R. 312; *Hickey v. Stover*, 11 O. R. 106. The wall

Argument.

between the rooms in question and the plaintiff's premises being an unbroken division wall, while there is no such wall between them and the remainder of the defendant's premises, these rooms could not be used by the plaintiff without alteration of the building by making openings in the division wall on their north side and building a new wall on the south; the rooms are a necessary part of the premises occupied by the defendant Lockerty, and have always been occupied by him; so that it is clear the intention of the testatrix was to devise the rooms to the defendant Boivine.

March 5th, 1889. MACLENNAN J. A.:—

I am of opinion that the judgment appealed from is right.

The question is, whether the rooms over the archway are parcel of the messuage lands and premises devised to Caroline Boivine, or parcel of the messuage lands and premises devised to Dr. Whiteford, and I am clearly of opinion that they are parcel of the devise to Mrs. Boivine for the reasons fully expressed by the learned Chief Justice before whom the action was tried, and also by the learned Justices of the Divisional Court.

The case of *Lyle v. Richards*, L. R. 1 H. L. 222, decides that the question of parcel or no parcel is one of fact and not of law, and when this lady's will is applied to her property no doubt is left on the mind that the rooms were intended to go with the store and dwelling over it as parcel thereof, and not with the hotel.

The devise is of "that messuage, &c., which is now occupied by Thomas Lockerty." The rooms are found to be structurally part of this messuage, and they were occupied by Lockerty, so that they are expressly included in the description of this devise.

Then the other devise is of "that messuage, &c., which said property is now occupied by one Daniel Coyle as an hotel." Now, structurally, the rooms are no part of the hotel, there is a solid brick wall between the hotel and the

rooms from top to bottom, nor were they occupied by Daniel Coyle. The rooms are therefore as clearly excluded from the second devise as they are included in the first.

Judgment.
MAOLENNAN
J.A.

It was contended on behalf of the plaintiff that the testatrix did not know how the property was occupied. There is no evidence of this, and I think the presumption would be the other way. But I think there is evidence in the will itself that the testatrix did know how her property was occupied, and she deliberately made use of the mode of occupation to make her meaning and intentions more clear and explicit both in these two devises and in others. In her will she describes the hotel property as now vacant, but lately occupied by one Sarfield, as a hotel, and in the codicil she describes it as now occupied by Daniel Coyle, as a hotel. In like manner she describes how the properties devised in paragraphs 13 and 14 are occupied respectively.

I think the present case is stronger in favour of the defendant than was the case of *Press v. Parker*, 2 Bing. 456. In spite of the use of the words *all that messuage* in that case, the Court held that a cellar which was structurally part of it, and also within its ambit was included in the earlier and excepted from the later devise because of the reference, as in this case, to the manner of its occupation. I think that that case is decisive of the present so far as a decision upon the language of one will can govern another.

If the plaintiff's contentions were well founded, it would follow from *Swansborough v. Coventry*, 9 Bing. 305; *Wheeldon v. Burrows*, 12 Ch. D. 31; *Allen v. Taylor*, 16 Ch. D. 355, and *Russell v. Watts*, 25 Ch. D. 559, at p. 573, that the plaintiff would be entitled, in connection with the rooms, to a right of way, to and fro through the defendant's store and dwelling house and up the stair, by way of access to them, there being at the time of the death of the testatrix no other means of access to the rooms.

I think it is out of the question to suppose that the testatrix intended to give the rooms in dispute to the devisee of the hotel, and to subject the devisee of the store and the dwelling house over it to such a burdensome easement.

Judgment.

MAOLENNAN
J.A.

Besides the cases to which we were referred, the following are instructive: *Doe v. Parkin*, 5 Taunt. 321; *Doe v. Hubbard*, 15 Q. B. 227; *Hardwick v. Hardwick*, L. R. 16 Eq. 168, 175; *Whitfield v. Langdale*, 1 Ch. D. 61; *Homer v. Homer*, 8 Ch. D. 758; *Fox v. Clark*, L. R. 7 Q. B. 748.

HAGARTY C. J. O.:—

In agreeing in the judgment just delivered, I have only to add that it is inconceivable by me that the testatrix, knowing the occupation of both the hotel and the defendant's house, and that the latter did project some ten feet over the gangway, should have thought of cutting off this small space from the defendant's rooms, thereby seriously curtailing the beneficial occupation which she speaks of as existing, and with no apparent benefit to the hotel premises. It would be a most far-fetched and improbable suggestion that she intended so to do.

She could of course have done so had she pleased, but I think the words she has used require no such extraordinary construction. She gives the metes and bounds on the ground with care, but there would be an adequate reason for so doing, as she vested the soil of the gangway in the devisee of the hotel adjoining, and gave the right of way thereover to the defendant as an easement to the house devised to her.

I think on the evidence the testatrix must be assumed to have known well the extent and nature of the occupation of the hotel and defendant's house respectively.

OSLER J. A.:—I entirely agree.

BURTON J. A.:—

We are told that the learned Chief Justice who tried this case, visited the premises. It would, perhaps, have been more to the purpose if the testatrix had been shewn to have known their position, or it may be more correct to

say that had she known their position the will would presumably not have been drawn in its present form.

Judgment.

BURTON
J.A.

There was no evidence given at the trial, and we have to construe the will by ascertaining its intention, not upon conjecture merely, or upon speculating on what the testatrix may be supposed to have intended because we think that is more reasonable or probable than what some other construction would lead to.

The will must be in writing, and that writing only is to be considered, and the only way of arriving at this intention is by ascertaining the expressed intention, *i. e.*, the intention which the will itself, either expressly or by implication, declares, or (which is the same thing), the meaning which the words of the will, properly interpreted, convey.

The devise to Caroline Boivine, the defendant, is of all that certain messuage lands and premises situate on the west side of Front street, in the city of Belleville, lying next above or north of the property hereinbefore devised to Elizabeth L'Esperance, and which is now occupied by Thomas Lockerty, measuring from the north-east corner of the lot devised to Elizabeth L'Esperance, nineteen feet more or less frontage on said Front street, thence westerly in a straight line to the river Moira, together with all the buildings and erections thereon, together with right of way and free use of gangway, &c., which gangway is between the premises devised to said Caroline Boivine, and the property devised by me in this my will to William A. J. Whiteford (under whom the plaintiff claims.)

If this had correctly stated the nature of the devise to the plaintiff, the present difficulty would not have occurred, as, whether the rooms passed or not to Caroline Boivine, the plaintiff would have gained no title to the land over which the gangway, or as we should usually express it, alley way, passed.

When, however, we turn to the devise to James William Whiteford, through whom the plaintiff claims, which is in a codicil to the will, a previous devise of the same property having been revoked, we find the devise to him not only

Judgment.

BURTON
J. A.

embraces the hotel proper, but all the premises lying north of a line which forms the southern boundary of the alley and northern boundary of the land devised to Mrs. Boivine. It is in these words: (The learned judge read the paragraph of the will, p. 122, and continued.)

In other words the devise is subject to a certain specific easement and to certain charges, and to no other easement, limitation, or exception whatever.

This devise unquestionably vests in the devisee the fee simple of the land over which the alley way runs and *prima facie* everything above or below it.

The devise does not differ in any material matter from that which it revoked. It devised all the remaining premises owned by the testatrix north of the land devised to Caroline Boivine, and differs only in this that in the codicil the premises are described as occupied by one Coyle, whilst in the will they are described as vacant; but the premises are not confined to a certain number of feet of land and the buildings upon them, as they are in Caroline Boivine's case, but include the alley way and all the lands lying in rear.

From what language contained in this will am I justified in coming to the conclusion that it was the intention of the testatrix, to be gathered from it, that these rooms were to pass to the defendant?

If the testatrix had an actual knowledge of the situation of the property, and intended these rooms to pass with the store, we should have expected a very different description from that to be found in the will. On the contrary, if she intended them to pass with the hotel, she could scarcely have used more apt words.

The case relied upon by the Chief Justice in the Court below is very distinguishable.

In that case the testator had, until shortly before the will, himself occupied the premises which he devised to the plaintiff. Whilst so occupying he always used the cellar as part of the premises, although in fact it was under the adjoining house which he devised to the defendant or his wife.

The plaintiff, after the testator ceased to occupy the premises, was in possession and used the cellar as before, and at the time of the making of the will he so occupied.

Judgment.

BURTON
J.A.

The testator, and his son the plaintiff, whilst in possession of the house, always used the cellar as part of the house, and the testator owning both houses had a right to make whatever disposition he liked of them. When he devised the property to his son as the messuage in which he then lived, there could be little difficulty in construing it as meaning the premises of which he was then in possession and occupation, and this was made even clearer by the devise to the defendant, to whom the adjoining property was given, by the same will, in these words: "All that my freehold front or tenement now in the occupation of Edwards" who was not, and never had been in the possession of the cellar.

If in the present case the devise to Mrs. Boivine had been of the store and premises now in the occupation of Lockerty, without any limitation as to the nineteen feet, then I should agree that the precise question now raised would properly have come up for decision, and there being an inconsistency between the devises in the two clauses, the Court should so construe them as, if possible, to give effect to each; and as at present advised, I should hold that notwithstanding the unqualified gift to Whiteford, it would have to give way to the other devise which was intended to pass everything of which Lockerty was in possession.

The language of the learned Judges in giving judgment in that case fits this exactly, and is to the effect that where a devise is limited, as it is here, to a local description, evidence cannot be admitted to shew that anything beyond what the testatrix herself denoted would pass.

Here the nineteen feet and the building upon it occupied by Lockerty was all that was apparently intended to pass.

Looking at the will alone we find a clearly expressed intention that the hotel property bounded by the south line of the alley way was intended to pass to the plaintiff,

Judgment.

BURTON
J. A.

and so much of the message as lay south of that line was intended to pass to the defendant.

Adopting the language of Lord Wensleydale in the House of Lords in *Abbott v. Middleton*, 7 H. L. C. 68 : "It is now universally admitted that in construing (a will) the rule is to read it in the ordinary and grammatical sense of the words, unless some obvious absurdity, or some repugnance or inconsistency with the declared intentions of the (testator) to be extracted from the whole instrument should follow from so reading it. Then the sense may be modified, extended, or abridged, so as to avoid those consequences, but no farther."

This is stated as a "Cardinal rule from which, if we depart, we launch into a sea of difficulties not easy to fathom."

How can we say that the reason for having these rooms as an adjunct to the store, necessary possibly at one time, may not have ceased to exist, or that it may not be a matter of importance to increase the accommodation of the hotel property, and that the testatrix having these considerations in view may not have determined to make the change. It would be a most dangerous rule, merely on a conjectural hypothesis of the testator's intention, however reasonable, to place a construction on a will in opposition to the plain and obvious sense of the instrument.

There is nothing ambiguous on the face of the will—the devise is of the nineteen feet, and the buildings on it, in the occupation of Lockerty. To admit evidence to shew that the testatrix intended to pass not only the premises in the possession of Lockerty in the building erected on the nineteen feet, but also the portion over the land devised by the same instrument to Whiteford, would be not merely calling in the aid of extrinsic evidence to apply the intention of the testatrix as it is to be collected from the will itself to the existing state of her property, but is calling in evidence to introduce into the will an intention not apparent upon the face of the will ; it is making the will speak upon a subject which she has already dealt with in a

different way, and in effect to allow a parol will of lands to revoke an express devise made by the will itself.

Judgment.
BURTON
J.A.

Such evidence it is manifest would not be admissible, and the admission of the fact of occupation cannot enlarge the subject matter of the devise beyond what we find in the language of the will.

My decision is based entirely upon the language used by the testatrix, and I cannot see my way to extending the words used beyond their obvious and grammatical meaning. To do so would, in my opinion, be making a new will giving to the defendant what by the will was never intended to be given to her, but in fact revoking by a parol devise a portion of the will under which the plaintiff claims which is in itself free from any ambiguity.

I think the appeal should be allowed.

Appeal dismissed with costs, BURTON, J.A., dissenting.

CLARKSON V. THE ATTORNEY-GENERAL OF CANADA.

Revenue—Customs duties—Assignment for the benefit of creditors—Preference of Crown over subject—Writ of Extent—R. S. O. ch. 94.

On the 3rd February, 1887, B., a coal merchant, made an assignment to the plaintiff for the benefit of his creditors. At the time of this assignment there was due by B. a large sum for duty on coal that had been previously imported by him and sold. The Crown claimed payment from the plaintiff, as assignee of B., of the amount due for duties in priority to the payment of the claims of the general creditors of the estate.

Held, affirming the judgment of ARMOUR, C.J., that the Crown was not entitled to such priority and that if it elected to come in under the assignment it was bound by the terms thereof and could take only ratably and proportionately with the other creditors.

By an agreement entered into before action, the Crown was placed in the same position as if a writ of extent had been issued against B. on the 19th day of February, 1887, for the recovery of the duty payable by B.

Held, in this also affirming the judgment of ARMOUR, C.J., that a writ of extent so issued would have availed the Crown nothing as far as any property covered by the assignment was concerned.

Observations upon the effect of a decision where the Court is equally divided.

Statement. THIS was an appeal by the defendant from the judgment of ARMOUR, C. J.

On the third day of February, 1887, Patrick Burns, who prior to that time carried on business as a coal merchant, in the City of Toronto, made an assignment, under 48 Vic. ch. 26 (O), to the plaintiff, of his estate and effects for the benefit of his creditors. At the time of this assignment Burns was the owner of a large quantity of coal stored in his coal yards in the City of Toronto. These yards had been accepted as bonded warehouses under the provisions of the Customs Act, and bonds had been given by Burns with proper sureties conditioned for the payment of duty on coal imported by him. Burns, with other dealers who had given bonds in this way, was permitted by the Customs Department, under certain orders in council, to deliver the coal from his yards without first making the entries and paying the duty in respect of each delivery, he making an entry once a week in respect of the quantity delivered during the preceding week, and paying the duty on such quantity. At the date of the assignment by Burns to the plaintiff there

was owing by Burns in respect of duty on coal previously sold and disposed of by him the sum of \$7,461.40, and at this time there were also large quantities of coal in the yards of Burns, the duty on which had not then been paid. The Customs Department, after the making of the assignment, claimed a lien on behalf of the Crown upon the coal stored in the yards for the duty unpaid in respect of this coal, and also for the overdue sum of \$7,461.40, and claimed in the alternative that they were entitled to payment of the overdue amount in priority to the general creditors of the estate and demanded payment of this sum from the plaintiff as assignee. The plaintiff had in his hands assets more than sufficient to pay this sum, but the assets were not sufficient to pay all the creditors in full. The plaintiff refused to recognize the lien for the overdue amount or to pay that sum or any part thereof except in the way of dividends upon the estate as in the case of ordinary creditors. He however recognized the right of the Crown to be paid in full the whole amount of the duty payable in respect of the coal in the yards at the date of the assignment, and this sum was paid. Subsequently an agreement was entered into between the plaintiff and the Collector of Customs at Toronto, on behalf of the Crown, providing that the sum in dispute should be deposited in the Bank of Montreal in Toronto to the joint credit of the plaintiff and the Collector of Customs, and that an action should be brought to have the respective rights of the assignee and the Crown decided.

The agreement also provided that the Crown should, for the purposes of the action, stand in the same position, (without actually issuing the writ), as if a writ of extent had been issued on the 19th day of February, 1887, against Burns to enforce payment of the sum of \$7,461.40.

Pursuant to this agreement this action was brought and the following questions were stated for the opinion of the Court.

1. Had the Crown a lien on the coal in the yards at the date of the assignment for the said sum of \$7,461.40 or any part thereof?

Statement.

2. Has the Crown a preferential claim upon the estate of Burns, in the hands of the plaintiff as assignee, for the said sum ?

3. Would the Crown have been able to recover from the plaintiff, or from the estate in his hands as assignee, the said sum of \$7,461.40, had a writ of extent been issued on the 19th day of February, 1887, against Burns to enforce the payment of this sum ?

There was a fourth question stated as to the liability of some consignees of coal imported by Burns, but delivered direct to these consignees, to pay the duty on coal consigned to them. This question was not however pressed by the counsel for the Crown.

The action came on to be heard by way of motion for judgment before Armour, C. J., on the 27th day of April, 1888, and on the 18th day of May, 1888, judgment was delivered (reported 15 O. R. 632) answering the questions stated in the negative, and directing judgment to be entered for the plaintiff with costs.

The decision upon the first question was acquiesced in, but from the decision upon the other two questions this appeal was brought, and came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ. A.) on the 17th day of January, 1889.

Robinson, Q. C., for the appellant. The claim on the part of the Crown, for the debt due by Burns, was payable by the plaintiff, as assignee for the benefit of creditors, in preference to the claims of other creditors, and there is no warrant for the distinction suggested between claims in winding-up cases, or upon estates in bankruptcy, and claims upon estates assigned in trust for creditors. The rule is that whenever the right of the Crown and the right of the subject, with respect to the payment of a debt, come together and conflict, the Crown's right prevails: *Re Churchill, Manisty v. Churchill*, W. N. 1888, p. 159; *Attorney-General v. Leonard*, 38 Ch. D. 622; *Re Henley & Co.*, 9 Ch. D. 469. The statute, R.S.O. ch. 94, (29-30 Vic.

ch. 43), does not abolish the prerogative right of the Crown **Argument.** with respect to the payment of debts, where such right comes into competition with the right of the subject, but merely prevents the property of any person entering into a bond or covenant, or being indebted to the Crown, from being bound as it was before that enactment. The statute, 48 Vic. ch. 26 (O), is *ultra vires* and the plaintiff's claim as assignee thereunder cannot be supported.

Lash, Q. C., for the respondent. The principles applicable in winding-up proceedings are not applicable in this case. This is merely a private trust, and the Crown must either adopt *in toto* the provisions of the trust, if it seeks to take the benefit of it, or repudiate them *in toto*, and seek its remedy in some other way than by sharing in the trust estate. The provisions of the trust deed require the plaintiff to distribute the estate ratably and proportionately and without preference or priority among the creditors of Burns. If the Crown claims as a creditor it must claim under this trust and so take only a ratable share. To allow it to be paid in full would be to enable it to take the benefit of the trust and at the same time to repudiate its provisions. At any rate the statute, R. S. O. ch. 94, does away with any distinction between debts due from the subject to the Crown, and debts due from subject to subject, and places them all upon the same footing. Whether the statute, 48 Vic. ch. 26, is *ultra vires* or not does not affect the question. The plaintiff is not seeking to take advantage of any special provisions of that Act, but claims under the assignment from Burns, which does not depend for its validity upon that Act.

Robinson, in reply.

March 19th, 1889. BURTON J. A.:—

We can affirm the judgment of the Court below without in the slightest degree coming in conflict with the judgment of the Supreme Court in the case of *The Queen v. The Bank of Nova Scotia*, 11 S. C. R. 1, a decision which

Judgment.

BURTON
J.A.

is binding upon us even if we did not agree in it; but for myself I would say that I entirely concur in that decision.

In that case, and in some of the recent cases in England, the question arose under the Winding-up Act, where the property still remained in the debtor.

It is clear that in such cases the Crown could, by the issue of an extent, seize the property, not being bound by the Act as an ordinary creditor would be; and apart from that, if it were treated solely as an administration of assets by a Court of law, the Court would be bound wherever the right of the Crown and the right of a subject with respect to the payment of a debt of equal degree came into competition, to give priority to the claim of the Crown.

The principles applied under a winding-up Act are not applicable to this case which is that of a trust deed for the benefit of creditors.

Now it is clear that the Crown can only take under a writ of extent the property of a debtor at the time of the issue of the writ. If the debtor has then assigned or transferred his property, the Crown cannot take it.

But for our own Act rendering preferences illegal, the debtor under the Statute of Elizabeth might have transferred his property to pay any creditor he might choose to prefer, and in such a case the Crown, not being one of the creditors so selected for preference, could claim no benefit under the deed.

Here the trust deed to be valid must provide for the distribution of the assets assigned *pari passu* and without preference or priority. The Crown is not bound to come in, but if it does so, it must in seeking the benefit of the trusts adopt the provisions of the trust deed *in toto*. The property has vested in the trustee: the Crown cannot reach it by any process, and if it elects to avail itself of the benefit of the deed, it takes just what the deed gives.

No question of prerogative arises in such a case; the Crown voluntarily submits to take such benefits as are given by the deed.

I do not think it necessary to add anything further to the full and able judgment of the learned Chief Justice of the Queen's Bench Division, which upon this branch of the case I fully adopt. I express no opinion upon the construction of the statute 29-30 Vic. ch. 43, it being unnecessary in the view I take of the case.

Judgment.

BURTON
J.A.

The question of the statute 48 Vic. ch. 26, being *ultra vires*, though referred to was not argued, the counsel apparently treating it as *res judicata*. This, with great submission, is a mistake—the question has never been decided in this Court. The opinion was expressed by two of the members of this Court (17th January, 1883) in *Re Hall*, that where this Court is equally divided, the judgment below remains unreversed because there is no judgment reversing it, but that it was not to be regarded as any adjudication of the question of law which might be in controversy, and that it was operative only as disposing of the particular appeal.

On the 28th April, 1884, the Court of Appeal in England gave a formal judgment upon this very point, *The Vera Cruz*, No 2, 9 P. D. 96, and the Court unanimously held that although the question of law was the same as in the previous case in which the Court were equally divided, they were not bound by the result, and that the previous case, although binding on the actual litigants, was not decided in a manner which made it binding on persons who were not parties to that litigation.

I hold myself perfectly at liberty to change my opinion, if, on further argument, I can be convinced that the views of those opposed to mine in the former case are the more correct.

At present there is no decision of this Court, as such, upon the question of *ultra vires*, and in this as in any other case coming up, those who are called upon to decide must choose one of the two adverse opinions.

OSLER J. A. :—

When this case is examined it appears exceedingly plain, and may almost be said to be covered by authority.

Judgment.

OSLER
J.A.

It was not argued that the Crown had a lien on the coal in the yard at the date of the assignment for duties due by the assignor in respect of coal previously sold by him.

The coal actually assigned could not have been extended under a writ of extent after it had by virtue of the assignment become vested in the defendant as trustee for the creditors of the assignor. On this point the cases cited below are conclusive, their result being summed up thus in *Ex parte the Postmaster-General, In re Bonham*, 10 Ch. D. 595. "It is quite clear that the Crown can only take under a writ of extent the property of the debtor at the time of the issue of the writ; if the debtor has assigned or transferred his property, of course the Crown cannot take it."

This is the foundation of the distinction between proceedings in bankruptcy, and proceedings in liquidation under a winding-up Act, or in administration suits, as regards their effect upon the right of the Crown under an extent. Under the latter the debtor's property is not divested, and remains liable to be taken upon the Crown's execution, or if the Crown submits to come in and prove in the administration of the assets in the liquidation proceedings, or in an administration suit, it is competing with other creditors in the disposition which the law is making of the assets of the debtor, the property in which has not been changed, and has the right of being paid in priority to them.

But in bankruptcy proceedings the property is altered and becomes vested in the assignee in trust for the creditors. The competition between the Crown, and creditors promoting the bankruptcy, is referred to in many cases. The creditors' object was to get the commission of bankruptcy sealed by the Chancellor in order that the commissioners, who had no estate in themselves, but merely a power to pass or convey the estate of the bankrupt, might do so before an extent could issue, since no assignment could be made until the commission had been sealed. The

bankrupt's estate having then passed to the assignees, the Crown could only come in and prove upon the estate in their hands along with other creditors.

Judgment.

OSLER
J.A

The subject is thus clearly treated in Burton on Bankruptcy, p. 6, under the head of "privileged debts":

"It is usual to say in England that the Crown is preferred for its debts over all other creditors, but the nature of this preference was not a tacit right to payment, independently of execution, following the debtor's property after it has gone out of his hands, but a prerogative right to anticipate other creditors proceeding to execution, and get before them. 1 Co. Lit. 131; 2 Co. Lit. 32. The manner in which the Crown might exercise this right was limited by 33 H. VIII. ch. 39, sec. 74, the foundation of the present execution by extent, and unless the Crown adopt the means of anticipating the subject, there and in other statutes provided, it obtains no preference. If the Crown held a preference it would not be defeated by bankruptcy, but the assignee would hold the estate liable to the preference, as in the case of a creditor holding a security, but unless the Crown adopts the means of enforcing its privilege, it only gets a dividend with the other creditors."

See also page 90, where *Wydown's Case*, 14 Ves. 80, is cited.

I refer also to Griffith and Holmes on Bankruptcy (1869) p. 417; *R. v. Arnold*, 7 Vin. Abr. 104; *Attorney-General v. Leonard*, 38 Ch. D. 622 at p. 624.

In principle the right of the Crown to prove for its debt under an assignment in trust for the benefit of the assignor's creditors, cannot be placed on higher ground than its right to prove in bankruptcy proceedings.

Assuming, as we must, the debtor's right to make such an assignment of his property, the right of his creditors, including the Crown, to proceed against it by execution is gone, and all who seek to take the benefit of the trust must come in under the terms of the trust deed on equal terms.

I do not think the case turns at all upon the R. S. O. ch. 94—29-30 Vic. ch. 43.—"An Act respecting Crown

Judgment.

OSLER
J.A.

debtors." The decision would be the same if no such Act was in existence, and it is of course unnecessary to express any opinion as to the effect of the Creditors' Relief Act upon the right of the Crown, where there are concurrent executions in the sheriff's hands at the suit of the Crown and of a subject.

In the reasons of appeal the appellant submits that the Act, 48 Vic. ch. 26 (O.), under which the plaintiff claims, is *ultra vires* the Provincial Legislature. This objection was mentioned on the argument of appeal. It was not abandoned, in order I presume that the appellant might not be precluded from urging it elsewhere should he be advised to carry the case further, but it was not pressed, because it may have been thought there was no practical advantage to be obtained by doing so, looking at the full discussion and consideration which the question recently received in this Court in *Clarkson v. Ontario Bank*, 15 A. R. 166, and other cases, where the Act was held to be *intra vires*. In these cases the members of the Court were, however, equally divided, and therefore the Court is, technically, not bound by that decision. In saying this I by no means suggest that on another occasion the result of another argument might be different, or invite further discussion of the question. The parties themselves must be the best judges whether any practical benefit is likely to be gained by it, but I wish to point out that the rule has thus been laid down by the Master of the Rolls in the recent case of *The Vera Cruz*, No. 2, 9 P. D. 96. The question there was whether the Court of Appeal was bound by a previous decision in a former case, *The Franconia*, 2 P. D. 163, where the Court was equally divided. "This," says the Master of the Rolls, "raises the question whether any Court is bound by a decision of its own, which decision was grounded on the fact that the members of the Court present were equally divided. It was the custom for each of the Courts in Westminster Hall to hold itself bound by a previous decision of itself or of a Court of co-ordinate jurisdiction. But there is no statute or common law rule by which one

Court is bound to abide by the decision of another of equal rank, it does so simply from what may be called the comity among Judges. In the same way there is no common law or statutory rule to oblige a Court to bow to its own decisions; it does so again on the ground of judicial comity. But when the Court is equally divided this comity does not exist, for there is no authority of the Court as such, and those who follow must choose one of the two adverse opinions. And if the books are examined I have no doubt it would be found, if authority there be, that when a Court is equally divided, if the case comes before it again, it will exercise an independent opinion and abide by one of the two views. It is clear therefore that we are not bound by the result of the judgment in the previous case of *The Franconia*."

Judgment.

 OSLER
 J.A.

Bowen and Fry, L.JJ., were of the same opinion, holding that the previous case, though binding on the actual litigants, was not so decided as to make it binding on persons who were not parties to that litigation. A Court composed of three members then dissented from the previous decision in which some of them had taken part, and in which a Court of four members had been equally divided. I refer also to *Bright v. Hutton*, 3 H. L. C. 341, and *Ridsdale v. Clifton*, 2 P. D. 276, noted in the *Vera Cruz Case*. In theory at least the rule laid down applies to our own Court of Appeal. Whether it is worth acting upon except in cases when from an entire change in the personnel of the Court it seems probable that a unanimous decision, one way or the other, may be arrived at, is, as I have said, for litigants themselves to consider. For myself I am prepared to follow the decision in the *Clarkson Case*, though opposed to my own view, until the Supreme Court decides otherwise.

It is certainly desirable that a binding decision one way or the other should be obtained.

The present appeal must be dismissed.

Judgment. **MACLENNAN J.A. :—**

**MACLENNAN
J.A.**

I am of opinion that this appeal should be dismissed.

The authorities cited by the learned Chief Justice of the Queen's Bench Division in his judgment, clearly shew that goods *bond fide* assigned by a debtor in trust for his creditors cannot be taken under an extent.

But it was ingeniously argued by Mr. Robinson that the trust in the present case being for the benefit of all creditors, the Crown by its prerogative was entitled to be paid in full, if there was not sufficient for all; and *Re Henley & Co.*, 9 Ch. D. 469, was cited in support of that contention.

I am unable to see that this contention is well founded in reason, or that it derives any support from the case referred to.

If the Crown claims the benefit of a trust, as no doubt it may do, it would be contrary to all principle to alter its terms so far as the Crown is concerned. If there is a trust with defined terms, those terms must be observed and regarded by all who take under it, otherwise the taking would be in opposition to, and in spite of, the trust. In order to do this the trust must be destroyed.

It is said the Crown comes in as *cestui que trust* and having come in, prerogative entitles it to claim priority, because whenever the title of Crown and subject comes into collision or competition the subject must give way. The answer to that however in my judgment is that by the trust each creditor, including the Crown, is to be paid ratably and proportionately, and so there is no collision or competition, and the case for applying the prerogative right does not arise.

Nor do I think the *Henley Case* assists the appeal. That was a case of winding-up. The property was still in the debtor. The Companies Act provided for the liquidation of the company's affairs, that is to say the distribution of its assets among the creditors. The Act provides that in case of a deficiency to pay all creditors, they shall be paid rata-

bly and proportionately, but the Crown was not named in, and so was not bound by, the Act ; and although the winding up may be regarded as the administration of a trust, and although the Crown was held entitled to come in as *cestui que trust*, yet there was no term of the trust restricting the Crown to *pari passu* payment, and the prerogative right was held entitled to prevail.

Judgment.
MACLENNAN
J.A.

In the present case it is different. The debtor did what he had a perfect right to do. He assigned his property to a trustee, and so put it beyond the reach of an extent, and he did what he also had the right and power to do, he declared that all creditors should fare alike.

HAGARTY C. J. O. concurred.

. *Appeal dismissed with costs.*

IN THE MATTER OF ROBERTSON AND THE MUNICIPAL
COUNCIL OF THE TOWNSHIP OF NORTH EASTHOPE.

Municipal corporations—Drainage by-law—Petitioners for—Necessity for application by majority of owners benefited—R. S. O. ch. 184, secs. 291, 292, and 569.

A petition of land owners under 46 Vic. ch. 18, sec. 570 (R. S. O. ch. 184, sec. 569), for the construction of drainage works must include a majority of all the persons found by the engineer to be benefited by the proposed works and not merely a majority of the persons mentioned in the petition itself as being benefited.

Unless the petition is signed by such majority the council have no jurisdiction and a by-law founded on a petition not so signed is void and cannot be upheld even though valid on its face.

If the petition is not signed by such majority the opponents of the by-law are not restricted to the mode of objection given by sections 292 and 293 of the Act of 1883, (R. S. O. ch. 184, secs 291 and 292), but are entitled to attack the validity of the by-law on this ground by application to quash even after an unsuccessful appeal to the council.

Where a council know that a majority have not signed though no evidence to prove this fact is given by the opponents of the by-law, it is just as much their duty not to pass the by-law as if its insufficiency had been proved after the most elaborate investigation at the instance of persons opposed to it and they have no right to impose upon the opponents of the by-law as a term for refusing to pass it, any condition as to payment of expenses theretofore incurred.

Decision of STREET, J., reversed.

Statement. THIS was an appeal from the judgment of STREET, J., upon an application by four property owners, assessed for the cost of certain drainage works, to quash the by-law of the council authorizing the construction of these works.

On or about the 11th of October, 1886, a petition was presented to the township council by certain land owners, praying that the steps and proceedings pointed out in the Consolidated Municipal Act of 1883, and amendments thereto, might be taken, for the purpose of deepening and straightening a certain creek running through a portion of the township.

Pursuant to this petition, an engineer was directed by the council to make the necessary plans and assessments, and in his report he added to the lots mentioned in the petition, other lots as being benefited by, and liable to con-

tribute to the cost of, the proposed works, and omitted some of the lots mentioned in the petition. Statement.

On or about the 27th of April, 1887, a by-law, for the construction of the works, was provisionally passed, and a date fixed for the sitting of a Court of Revision. Some of the land owners mentioned in the petition appealed to the Court of Revision, and from it to the county Judge, against their assessments, and subsequently presented to the council a counter-petition, praying that the works might not be proceeded with, and offered in that counter-petition to pay their proportion of the expenses incurred up to that time. The council, after considering the counter-petition, notified those presenting it, that they would not pass the by-law in question if they paid the whole expenses incurred up to that time. This the opponents of the by-law would not do.

It appeared by reference to the last revised assessment roll, that the owners of the property to be benefited were fifty-nine in number. The petition was signed by thirty-one persons; but it was admitted that three of these persons were not entitled to sign, and the council received the petition as one signed by twenty-eight persons only, and then directed the engineer to make the surveys. Some changes were made by the engineer as above stated, though in the result there was still not a majority in favour of the petition, and this was one of the grounds of objection raised by the counter-petition, but the council refused to give effect to it.

The application to quash the by-law was argued before STREET, J., who refused the application, holding that, as the by-law was valid on its face, it might be upheld though not petitioned for by a majority of those benefited by the works. See 15 O. R. 423.

From this judgment this appeal was brought, and came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 11th and 14th of January, 1889.

Argument. *Lash, Q. C., and J. E. Harding, for the appellants.*
Idington, Q. C., for the respondents.

April 30th, 1889. HAGARTY C. J. O.:—

An examination of the evidence compels us to accept as correct the finding of our learned brother STREET, that a majority of the land owners of property to be benefited by the drainage by-law, had not petitioned for it; that, in other words, the ground-work and foundation of the jurisdiction of the council did not exist.

The Legislature has granted large powers to be exercised for the drainage of lands, and compulsory assessment on private property for the necessary expense.

There can be no exception from contribution within the prescribed area, and each owner, willing or unwilling, is forced to contribute and have his property legally charged with the assessment

In emphatic language Gwynne, J., in *Township of Chatham v. Township of Dover*, 12 S. C. R. 321, at p. 338, says: "The preliminary essential condition precedent necessary to give the council jurisdiction to take any action which could have any binding effect whatever upon any persons sought to be made chargeable with any part of the cost of such a work, is that a petition should be presented to the council praying for the performance of the proposed work, describing its nature, and signed by a majority of the owners of the property to be benefited by the proposed work."

We cannot be too careful, and we think the council should be equally careful, in requiring that this essential foundation should always exist before such very serious interference with the rights of owners of property should be undertaken.

The majority is allowed the right of binding the minority, but there should be no reasonable doubt allowed to exist as well of the existence of such a majority, and of its being signified in the manner required by law.

I fully agree with the learned Judge, when he says: "The petition should include a majority of all the persons whom the engineer finds to be benefited by the proposed work, and, therefore, if the lands benefited extend so far beyond those mentioned in the petition as to reduce the majority to a minority, the council should not proceed with the matter without obtaining the consent of a majority of the whole."

Judgment.

HAGARTY
C.J.O.

We have not to discuss here a question, said to be decided in *Re Montgomery and the Township of Raleigh*, 21 C. P. 381, viz., whether a majority of owners of the lands mentioned in the petition be sufficient, or a majority of the owners of the lands ultimately to be benefited on the report of the surveyor.

The point is not decided in the case mentioned, nor does it apparently arise.

A large portion of the discussion in that case, was as to the allegation that other lands than those assessed, were benefited. The Court properly decided that they must assume "that the lands so assessed, are assessed as the only lands within the municipality regarded as benefited by the proposed work."

The applicants against the by-law had urged in the Court of Revision, that other lands were benefited. The Court of Common Pleas held that this was a matter to be heard and decided under the statute in the Court of Revision and was not a ground for quashing.

The Court also held, "Treating the by-law, with the schedule thereto annexed, to be a finding by the council, impliedly, that these are the only lands in Raleigh benefited by the work, the petition appears to have been signed by a majority of the resident owners of the property assessed."

In the case before us, it would appear that there was not an actual qualified majority of the owners of the lands mentioned in the petition, nor of those (included) afterwards reported by the engineer as benefited and ultimately settled in the schedule to the by-law.

Judgment.

HAGARTY
C.J.O.

It was argued before us that the objections on this head should have been, but were not, taken before the council under sections 292 and 293, of the Act of 1883.

But it is clear on the evidence that the whole matter was discussed and re-discussed before the council, that a counter-petition was presented and discussed, and a large amount of allegation and counter-allegation as to the various names appearing on both the petitions, as to how and on what representations they were put there, &c.; and substantially the question under discussion was, what the wishes of the parties interested were as to the passing of the by-law.

The reeve's affidavit states that when the counter-petition came in, there was an adjournment granted to enable the parties presenting it to shew if they could, that instead of a majority of those interested being in favour, there was a majority against the work.

It is very clear from the statement that the question of majority for or against the work, was raised and discussed.

It seems that at the adjourned meeting, that it was stated that the council would not pass the by-law if the opponents would pay the expenses incurred amounting to about \$300, which they declined to do, and the council decided to go on with the by-law, though a large majority at the meeting objected.

If this be correct, it was a curious proceeding on the part of the council to let such a question depend on whether the objectors would or would not pay a large sum of costs. The real question, of course, was, whether the jurisdiction of the council existed, or did not exist, whether it was clear that there was a majority of those interested as owners in favour of the scheme.

But, regarding the real question for decision to be jurisdiction or no jurisdiction, I do not see that the statute either makes the decision of the council on such a point final or confines the right of the objectors to that of urging their objections before the council under these sections 292 and 293, leaving the decision to that tribunal.

This would be in effect making the jurisdiction to depend wholly on the will of the council.

Judgment.

HAGARTY
C.J.O.

I am unable to concur in my learned brother's opinion that, notwithstanding the want of a majority to found jurisdiction, the by-law can still be upheld; nor can I take his very favourable view of the course which the council determined to take.

I must confess that the impression left on my mind from a perusal of the evidence is, that it was chiefly, if not solely, because the objectors would not or could not consent to pay some hundreds of dollars for the costs incurred by the council, that the by-law was proceeded with.

In all cases of this kind—largely invading the rights of private property—it should, I think, be incumbent on the council to be certain beyond speculation or guess work that a majority of those interested had clearly sanctioned the proposed work, so as legally to found jurisdiction to bind a dissentient minority.

The question of costs to be paid by one side or the other should have no effect whatever on the course of the council in deciding to proceed or not to proceed.

The safe and prudent course to avoid the risk of incurring useless cost, would be to be reasonably certain before incurring the costs of an expensive survey, that the proposed improvement had the sanction of a majority of the land owners to be benefited.

It may often happen that the result of the survey shews a much larger area of land to be benefited than that designated in the petition.

There ought to be, in my judgment, an absolute majority of all owners declared liable to assessment and contribution before those opposed to the scheme can lawfully be bound.

In *White and The Township of Sandwich East*, 1 O. R. 530, before the late Sir M. C. Cameron, it appeared that six out of eleven owners in a named locality, petitioned for a drain. On the survey forty-seven persons were added as owners of properties to be benefited. The learned

Judgment.

HAGARTY
C.J.O.

Chief Justice upheld the by-law, as he conceived on the authority of *Re Montgomery and the Township of Raleigh*, 21 C. P. 381.

I must dissent from such a construction of the municipal law, and I do not at present see that the case relied on adopts such a view of the law.

I have already pointed out what was really the question decided in that case.

We have had of late to give much consideration to this question of the validity of by-laws which affect private rights of property, and in regard to which the statute law properly provides certain preliminary conditions as the necessary ground work and foundation of jurisdiction; *Re Ostrom and The Township of Sidney*, 15 A. R. 372, was a case of that character.

My brother Osler reviews the authorities in delivering the judgment of this Court. The statute there declared that no council should open or establish a highway until a month's notice had been given, &c. The notice appeared to be a day short of the month, and this Court felt bound to quash the by-law.

The by-law now in question is one largely dealing with private rights and property, and is, as I consider, wholly dependent on the statutable preliminary conditions being observed before it can acquire any authority.

If we decline to quash, then it can be used for the compulsory charging of private property, subject to the question of law whether it can be successfully attacked by action after the failure to quash.

If we uphold it, it stands as a by-law which the Court has held sufficient.

I think we are bound to say that it cannot be supported.

MACLENNAN J. A. :—

I agree in the judgment of the learned Chief Justice.

The first question is, whether the petition was signed by a majority of the "persons as shewn by the last revised

assessment roll to be the owners (whether resident or non-resident) of the property to be benefited," as required by section 570 of the Act of 1883.

Judgment.
MACLENNAN
J. A.

The assessment roll, so far as it relates to the lands mentioned in the petition as lands to be benefited, is proved by a copy certified by Mr. Fisher, the township clerk, and the number of owners shewn thereby is plainly fifty-nine. The number of names on the petition is thirty-one, but three of these were disqualified and were not entitled to sign it, or to be counted. They were John B. Schmidt, whose name was not on the roll at all; Levi Cook, who is assessed upon the roll as a land owner's son only, and William Doetzert, who is assessed on the roll as a tenant, and not as an owner.

The reeve of the township, Mr. McMillan, and the clerk, Mr. Fisher, both admit that these three names should be omitted from the computation; nor do they pretend that there were more than twenty-eight good names to the petition.

In his affidavit, Mr. McMillan says that the petition is in the same condition as when presented to the council; that it was then considered by himself and fellow members of the council, and that it contained the names of at least twenty-eight whom he considered, and still considers, entitled to sign; and he adds: "same being a clear majority of those to be benefited by the proposed work."

Mr. Fisher, after saying that the petition is in the same condition as when presented to the council, goes on to say that in considering the petition, it was noticed by himself and the council that three names might not be entitled to be counted; that only twenty-eight of those signing were valid petitioners, and accordingly that number was entered in his minutes instead of thirty-one. He then says: "that the said twenty-eight constitute a majority in number of the persons appearing as owners of property to be benefited by the said work."

It is difficult to understand how these two gentlemen could venture to say, as they do, that twenty-eight was a

Judgment. majority of the owners of land to be benefited. It is as
MACLENNAN plain as anything can be upon the roll verified by Mr.
J.A. Fisher himself, that the total number of such owners as
shewn by the roll was fifty-nine, and it would require
thirty signatures at least to make a majority.

I have examined carefully not only their affidavits, but also their depositions in cross-examination, but there is no explanation whatever offered. One would regret to come to the conclusion that they both purposely omitted to refer to the roll as the proper means of shewing the persons to be benefited; but that is the appearance which the matter presents.

The number of owners on the roll is so plain and so clear, and the council having satisfied themselves that there were only twenty-eight good names to the petition, I come to the conclusion that when they considered the petition, the council ascertained and knew that the petition was insufficiently signed.

Sections 292 and 293 of the Municipal Act of 1883, make provision for objections by ratepayers interested in matters of this kind, and enable them to bring evidence, and to shew to the council that such a petition as this is insufficiently signed; and section 293 expressly forbids the council to pass the by-law if it is satisfied that the application does not contain a sufficient number of names.

The respondents, in the argument before us, relied very much on these sections, and contended that the opponents of the by-law should have availed themselves of them, and should have attacked the petition; and that, not having done so, they ought not to be heard afterwards to object to it.

But it was not necessary for the opponents of the by-law to attack the petition. It is now proved that the council itself scrutinised it and found it was insufficiently signed; and if they found that out for themselves, it was just as much their duty not to pass the by-law, as if its insufficiency had been proved after the most elaborate investigation at the instance of persons opposed to it.

So far, therefore, as the original petition is concerned, the subsequent proceedings of the council are, in my judgment, without any pretence of justification. It is contended, however, that the report of the engineer has made a change, both in the number of names entitled to be counted as petitioners, and also in the total number of persons to be benefited by the proposed works, and this is true. I am clear, however, that there is still not a majority of the whole number of names to the petition.

Judgment.
MACLENNAN
J.A.

The report of the engineer brings in three new names of persons to be benefited—namely, Adam Thompson, Henry Stein, and Frederick Ellwan, and there are four to be taken off—namely, Fisher, Becker, Rothmall, and Crerer, which still leaves the total number fifty-eight.

There is also one more name to be taken from the petition—namely, E. G. Oliver, who withdrew from it, and signed a counter-petition before any action was taken by the council, which, I think, he had a right to do, so that the final number of petitioners is twenty-seven, and the number required to make a majority is thirty.

It was argued that three other names should come off the whole number—namely, James Whiteman, Mrs. McIntosh, and Elizabeth McIntosh; but for the reasons stated by my learned brother Street in his judgment, I think these names cannot be taken off. But even if they were, there would still be an insufficient number of petitioners—namely, only twenty-seven out of fifty-five.

Being of opinion that the council deliberately incurred the expense of the engineer's enquiry and report, and passed the by-law complained of, knowing that the petition was insufficiently signed, I think the by-law ought to be quashed, and that the appeal ought to be allowed.

BURTON and OSLER, JJ.A., concurred.

Appeal allowed with costs.

Statement.

MACLENNAN V. GRAY.

Registry laws—Priorities—Unregistered mortgage—Dower.

R. G. and J. G. being the owners, subject to the dower of their mother R., and an annuity in her favour, of certain lands, mortgaged them to one C. to secure advances made by him to them. R. knew of the mortgage and was asked, but refused, to execute it. Subsequently R. G. and J. G. mortgaged the lands to M. to secure advances made by him. R. released all her claims for the purpose of this mortgage, but received no benefit from the advances. This mortgage was taken by M. without any notice of the mortgage to C., and was registered before it and gained priority over it. Under this mortgage the lands were sold, and after payment of the claim of the plaintiffs a surplus remained which R. claimed in priority to C.

Held, reversing the decision of BOYD, C., that she was not entitled to priority. The priority gained by M. by force of the Registry Act did not enure to her benefit as she was not a purchaser or mortgagee, nor did that priority enure to her benefit as surety by virtue of the doctrine of subrogation, because that doctrine could not be invoked to defeat the honest claims and superior equities of third persons.

THIS was an appeal by the defendant Coughlin from the order of BOYD, C., dismissing the appeal of the defendant Coughlin and the defendant Allan from the report of the Master in Ordinary.

One Charles Gray, who died on or about the 20th day of June, 1874, was at the time of his death the owner in fee simple of the north half of Lot number Two in the Broken Front of the Township of Clarke in the County of Durham. By his will he bequeathed to his wife, Rosanna Gray, an annuity, and to certain of his children pecuniary legacies, and he charged the annuity and legacies upon the lot in question, which, subject to these charges, he devised to his sons Richard Gray and John Gray. On or about the 1st day of March, 1879, Richard Gray and John Gray, mortgaged their interests in the lot to the defendant Coughlin to secure the sum of \$700. Rosanna Gray, their mother, was fully aware of the fact that this mortgage had been given, and had been asked to join in it for the purpose of binding her interest in the land but had refused. The mortgage was not registered until the 2nd day of January, 1880.

On or about the 1st day of November, 1879, Richard Gray and John Gray mortgaged the lot to the plaintiffs' tes-

tator to secure the sum of \$4,000. Rosanna Gray joined in this mortgage for the purpose of releasing her interest in the land but received no personal benefit from the mortgage, the moneys being paid over by the mortgagee to her sons the mortgagors. This mortgage was registered on the 27th day of November, 1879, without notice of the mortgage to Coughlin. Statement.

This action was brought by the plaintiffs against Richard Gray, John Gray, and Rosanna Gray, as defendants by original action, and a judgment for foreclosure or redemption, in the usual form, was obtained by default. The defendant Coughlin, and the defendant Allan, who was assignee of certain legatees, but had lost priority by his omission to register his assignment before his assignors were paid off by the plaintiffs' testator, were made parties in the Master's office as subsequent encumbrancers, and applied for and obtained an order for sale instead of foreclosure. The property was sold for the sum of \$7,500, and after payment of the claim of the plaintiffs the sum of \$1,612 remained in Court.

Rosanna Gray, who had not appeared in the action, then applied on petition and obtained an order allowing her to claim in the Master's office, as against the defendants Coughlin and Allan, that as annuitant and doweress, she was entitled to the surplus proceeds of the sale. Coughlin's claim under his mortgage was proved in the Master's office at the sum of \$1,028.08. The Master held that the claim of Rosanna Gray as annuitant and doweress was prior to the claim of the defendant Coughlin as mortgagee, and to the claim of the defendant Allan as assignee, and directed that the moneys in Court should be applied first in satisfaction of her claim, which was allowed at a sum nearly as great as the whole surplus. From this finding the defendants Coughlin and Allan appealed and the appeal came on to be heard before BOYD, C., who dismissed the appeal with costs. See 16 O. R. 421.

From this judgment the defendant Coughlin appealed and the appeal came on to be heard before this Court.

Statement. (HAGARTY, C.J.O., BURTON, and OSLER, JJ. A., and STREET, J.) on the 23rd day of January, 1889.

H. J. Scott, Q.C., for the appellant. Under the Registry Act an unregistered instrument is fraudulent and void as against a subsequent purchaser or mortgagee who has, without notice, registered his conveyance or mortgage. The object of the Act is to protect such persons only and the respondent does not come within the class of persons protected and should therefore be dealt with as if the Act did not exist, and then Coughlin's mortgage would have priority. Even if the respondent is in the position of a surety she could only be entitled to whatever her principals would be entitled to, and not to the rights of their creditor.

R. E. Kingsford, for the respondent. The respondent refused to join in the mortgage to the appellant and joined in the mortgage to the plaintiffs' testator solely for the benefit of the mortgagors, and as soon as that mortgage was satisfied the purpose for which the respondent joined therein was also satisfied, and as against her the mortgage became of no further effect. She is therefore restored to her original position as dowress and annuitant, and is entitled to priority over the appellant.

April 30th, 1889. HAGARTY C.J.O. :—

Mrs. Gray had full notice of the mortgage given by her sons to Coughlin, and that their estate was in fact only an equity of redemption when she joined in the mortgage to the plaintiffs' testator.

She did not covenant to pay the money, but merely released all her interest in and charges on the land.

I am unable to see how the Registry Act can be resorted to, to shield her in any way from the operation of this prior unregistered mortgage. The Act does not seem to apply except for the protection of parties registering against unregistered prior conveyances, and even that enactment fails to protect against actual notice.

Apart from that Act, Coughlin, the prior mortgagee, could of course have enforced payment against the estate of the sons, his mortgagors. It is clear from the evidence that such interest was amply sufficient to pay him off, over and above their mother's annuity.

Judgment.

HAGARTY
C.J.O.

We are free from the need of considering the case of the sons' interest not being sufficient to pay him.

Under the Maclennan mortgage, Coughlin being made a party as an encumbrancer, the whole property was sold by the Court, and some \$7,000, the value of all the interests, is in Court.

I am unable to see how she can be entitled to the surplus after paying Maclennan, as against Coughlin. She has in fact paid nothing on the Maclennan claim, and I do not think she comes under the provisions of the Mercantile Amendment Act. She has neither "paid the debt nor performed the duty," as prescribed by the statute, to entitle her to an assignment of the principals' mortgage on which she is said to be a surety.

See De Colyar, 2nd ed., p. 296 on the statute.

Whatever relief she can get must be, I think, under the general doctrine of equity.

Her mortgaged interest has certainly not produced the money required to pay off Maclennan. The sons' equity of redemption has paid a large portion, if not the largest portion of it, so that it cannot be said she either paid it off personally nor has the money in question been realized exclusively or mainly from the sale of her interest.

The general doctrine is discussed in several of the text books and in numerous cases.

Brandt, sec. 265, discusses many authorities, remarking "subrogation cannot be enforced when its enforcement would be contrary to equity, for the whole doctrine is the creation of equity."

Several American cases are referred to, in one of which, *Patterson v. Pope*, 5 Dana 241 at p. 245, it is said: The surety "is in general entitled in equity to all the remedies of the creditor against the person and property of the debtor.

Judgment.
HAGARTY
C.J.O.

But we are not prepared to admit that in any case this equitable right of remuneration from the principal debtor is a sufficient foundation for disregarding or subjecting to its satisfaction the interests of those persons which, although they may be subordinate to the lien of the creditor, are prior in date and more specific in character than the equity of the surety, which cannot commence till he has become bound for the debt, if indeed it can commence before he pays it."

Applying this principle to the case before us, it would seem anything but equitable to allow the general doctrine to be applied so as to cut out an honest mortgage known to the surety to be in existence long prior to her entering into the suretyship, or to invoke the statutable priority given to the registered against the prior unregistered mortgage.

The prior existing mortgage to Coughlin is only postponed to MacLennan as between the two mortgages. I cannot see how it can be defeated, as is here proposed, in favour of Mrs. Gray.

BURTON J. A.:—

The testator, Charles Gray, senior, who was the owner of the lands in question, died on the 20th June, 1874, having, a few days before his death, devised them to his sons Richard and John, subject to an annuity to his widow Rosanna of \$150, and to certain other charges.

On the 1st March, 1879, they executed a mortgage to the appellant Coughlin, which was not registered until after the mortgage to MacLennan. Mrs. Gray was aware of this mortgage, but refused to join in it.

On the 1st November following, the sons executed a further mortgage to the plaintiffs' testator MacLennan in which Rosanna joined, releasing all her interest in the lands for the purpose of the mortgage to the mortgagee. This mortgage was registered before that to the appellant.

Now it is unnecessary to say that if the mortgagors had

paid off this mortgage, Mrs. Gray's interest would have reverted to her, and she would have been entitled to her priority over the appellant, but that event has not happened. Default was made in payment, and the lands were sold under the decree of the Court and no doubt sold for more than they would have done if they had been encumbered by the widow's annuity and dower.

Judgment.

BURTON
J.A.

She occupied the position of surety for her sons but she is not in a position to claim any benefit under the registry laws. Those laws are for the protection of subsequent purchasers or mortgagees having no notice of a prior unregistered deed. Maclennan occupied this position, and any assignee from him would be entitled to the same protection, even though at the time he took the assignment he had acquired knowledge of Coughlin's mortgage.

But Mrs. Gray could not claim any such benefit. She knew when she joined in this mortgage to Maclennan that all her sons could mortgage was the equity of redemption or the interest remaining in the land subject to Coughlin's mortgage; that is all that would have passed to Maclennan if Coughlin had succeeded in registering his mortgage first.

By omitting to register he is by the effect of the registry laws postponed to Maclennan but nothing more. Mrs. Gray, even if she had paid off the mortgage and become entitled to a transfer of the security, would not occupy the position of Maclennan as she does not come within the protection of the registry laws as a subsequent purchaser, and the case as to her must be regarded as if there were no registry laws in existence. I have stated she knew of the existence of Coughlin's mortgage, and she joined in a mortgage of the equity of redemption,—as surety it is true for the mortgagors, but if the interest which the mortgagee had, had been sold, it would have left Coughlin's interest untouched, and his interest in the proceeds would have to be regarded in the same way as the land.

It was urged that although the widow knew of this mortgage there was no evidence to shew that she knew that it was unregistered, but that was I think immaterial.

Judgment.

BURTON
J.A.

If it had been registered, *cadit quæstio*; she could in that event have no possible claim; if she knew that it was unregistered, she was aware that the sons in concealing its existence were guilty of a fraud and as a *particeps criminis* she would be disentitled to claim priority, that would be in effect to allow her to take advantage of her own wrong. If she had no knowledge on the subject she was aware of the existence of the mortgage, and that the interest which the sons could rightly transfer, had been reduced by the amount of that mortgage, and she cannot ask that the surplus moneys arising from the sale should be applied to her benefit.

With great respect I think the orders made below were wrong, and that we should therefore allow this appeal and declare that the appellant is entitled to be paid the amount found due to him by the Master's report, with interest and the costs of this appeal, in priority to Mrs. Gray.

OSLER J. A. :—

The respondent though incurring no personal liability, pledged her interest in the property mortgaged by her sons as security for their debt, and she now seeks, in effect, to be placed in the position of the mortgagee, and to have the advantage of the statutory priority which, unexpectedly to her, his mortgage acquired by virtue of its prior registration, over the mortgage which her sons had previously given to the appellant Coughlin, and of which she had notice, when she joined in charging or releasing her own interest for the benefit of the plaintiffs' testator as second mortgagee.

I have not been more successful than the learned Chancellor, and the counsel who argued the appeal, in finding authority directly in point.

The case is novel in its circumstances, and is to be decided upon principle. The right of a surety or a person in the position of a surety to the benefit of securities held by the creditor, depends not upon the contract of the parties, but upon this, that as between the surety and the principal, the

latter is bound to indemnify the former or to protect the interest he may have charged or assigned as security. That is the equity which the respondent invokes here.

Judgment.

OSLER
J.A.

But the surety's equity to be subrogated to the securities held by the creditor will never be enforced against the superior equities of third persons, and the extent of the surety's equity in the present case appears to me to depend upon the relation in which the parties stood to each other when the respondent released or pledged her interest in the property, and not necessarily to be commensurate with the right which by his superior diligence the plaintiffs' testator acquired over the Coughlin mortgage. Had he never registered his mortgage the respondent would have had no reason to complain of Coughlin's priority, since it was with the knowledge of that priority that she charged her own interest. As against him, therefore, her right to be indemnified by the mortgagors, and her consequent equity to an assignment of the plaintiffs' mortgage, or to stand in their position, is inferior to Coughlin's right to be paid his mortgage out of the mortgagors' estate. She cannot ask to be placed in a higher position than she would have occupied had she at the time of joining in Maclennan's mortgage, taken another mortgage from her sons expressly for the purpose of indemnifying herself.

In a recent work by Mr. H. N. Sheldon, in which the law of subrogation appears to be very fully examined, I find the following observations on the subject of the surety's right (sec. 111): "Nor will a surety be subrogated to the rights and liens of a creditor so as to defeat an interest acquired and held by a third person, when that interest, though subordinate to the creditor's lien, is prior in date to the surety's undertaking. Thus, when a debtor sells property which he had mortgaged for a debt, and judgment having been obtained against him gives a surety for the judgment, who is afterwards compelled to pay it, this surety cannot be subrogated to the mortgage so as to defeat the purchaser's title, which accrued before the contract of suretyship was entered into. For subrogation is

Judgment.

OSLER
J.A.

purely an equitable result, and the subrogation of the surety to the creditor's means of payment does not depend upon privity, but rests solely upon principles of justice and equity, and when such claim is contested, it rests upon facts to develop and determine the rights of the parties in interest." The case of *Paterson v. Pope*, 5 Dana 241, is cited. See also *Hayes v. Steamboat Columbus*, 23 Mo. 232; *Wayland v. Tucker*, 4 Grattan 267; *Carrol v. Steamboat Leathers*, 1 Newberry's Adm. R. 432; *Hayes v. Ward*, 4 Johns. Ch. 123, 130; *Himes v. Keller*, 3 W. & S. 401; *Kyner v. Kyner*, 6 Watts 221, where it is said that the right to subrogation is founded upon a mere principle of justice and benevolence, and not necessarily upon either privity or contract between the parties.

Pomeroy's Equity Jurisprudence, vol. 3, p. 469 (n), may also be referred to: "The right of subrogation being a doctrine of purely equitable origin and nature, its operation is always controlled by equitable principles. It is therefore never enforced so as to defeat or interfere with the superior or equal equities of third persons, or with the legal right of third persons growing out of express contract."

There is nothing in these passages inconsistent with the way in which the principle is stated by Story, Equity Jurisprudence, English ed., secs. 499, 638, or by Lord Brougham in the leading case of *Hodgson v. Shaw*, 3 My. & K. 183, the foundation of which is, that it is against conscience that the creditor shall use his securities or pledges to the prejudice of the surety so as to prevent him from availing himself *against the debtor* of such securities and pledges in aid of his own responsibility. In the case at bar the plaintiffs' testator, as second mortgagee, gained no new or higher right against the mortgagors by the registration of his mortgage. The only result of his doing so was, that by force of the 76th section of the Registry Act (R. S. O. ch. 114), the appellant's prior mortgage became fraudulent and void as against him. The immediate scope and object of that section is the protection, not of the collateral equitable rights of sureties, but of subsequent purchasers and

mortgagees against prior unregistered instruments of which they have not had actual notice. When the surety stands in that respect in the same position as the creditor he may well urge that he is entitled to be subrogated to the creditor's right, but here, having had actual notice of the appellant's mortgage, what equity has the respondent to throw the plaintiffs' mortgage first upon that part of the fund in court which may be said to represent the interest of the mortgagors? Her equity to do this and thus to relieve that part which represents her own interest cannot be superior to the right of Coughlin as mortgagee of the legal estate under the express contract of her principals, executed before she charged her interest in favour of Maclennan, the sole circumstance out of which any equity of hers can possibly arise. Her claim is not founded upon a legal assignment of the plaintiffs' mortgage but upon an alleged right to the application of an equitable rule.

Judgment.

OSLER
J.A.

I think she cannot, under the circumstances, assert in aid or extension of that right a priority derived by the plaintiffs' testator, not from her principals but from the operation of the Registry Act.

For these reasons I am of opinion, with great respect, that the appeal should be allowed.

STREET J.:—

The circumstances establish that Rosanna Gray assumed the position of surety to Maclennan for the payment by her sons of the money which he advanced to them, and her interest in the land as dowress and annuitant was pledged to Maclennan as additional security for the advance.

The element in this case which creates any difficulty in determining the respective rights of the widow Rosanna Gray, and Coughlin, is the fact that she had actual notice of the existence of his mortgage at the time she became surety to Maclennan. She in fact knew that the interest which her sons could properly convey to him was an

Judgment. equity of redemption subject to the mortgage to Coughlin
STREET J. as well as to her dower and annuity.

The Chancellor, in the judgment appealed from, has held that the rights which, by virtue of the Registry Act, Maclellan acquired over Coughlin by reason of the prior registration of his mortgage, enure to the benefit of Rosanna Gray to the extent of enabling her to treat payment by Coughlin, or out of his interest in the land, as an extinguishment of the debt for which she became surety, and therefore as a discharge of her liability, the result being that she is declared entitled to a reassignment of so much of the security pledged by her to Maclellan as has not been absorbed by the payment of his debt.

From this conclusion I feel with great deference compelled to dissent for the following reasons.

Laying aside for the moment the effect of the Registry Act, the position of the parties immediately after the execution of the Maclellan mortgage was this: Coughlin's mortgage was the first charge, and Maclellan's mortgage was the second charge, and Rosanna Gray, as surety to Maclellan, had an equity to redeem him, and having redeemed him she would have had a right then to redeem Coughlin, because Maclellan's mortgage from Richard and John was subject, (apart from the Registry Act), to Coughlin's mortgage, and her rights in the land were therefore only in the residue after both Coughlin's and Maclellan's mortgages were satisfied.

When Maclellan by his prior registration without notice of Coughlin's mortgage acquired priority over him, the relative positions of the two mortgages were changed, but I am unable to see that this has in any way altered the position of Rosanna Gray.

The object of the registry laws is to protect purchasers and mortgagees taking without notice of unregistered claims, and for this purpose and to this extent it interferes with actual priorities: the protection is extended of necessity to the assignees of the protected persons although they may have notice at the time they take, for otherwise the

protection to the original innocent purchaser or mortgagee would often be incomplete. But the object of the registry laws having been attained, and the protection to the innocent purchaser or mortgagee having been fully afforded, the rights of persons who are not purchasers from him and therefore are not covered by the protection thrown over him remain as far as possible unaffected.

Judgment.

STREET J.

In the present case Maclennan was the person entitled to the protection of the registry law; when he had by virtue of its provisions obtained payment of his advance in priority to Coughlin the whole object of the law had been attained. Rosanna Gray had no need to appeal to it for protection against any unknown existing encumbrance as Maclennan had: the whole position of the title was known by her when she parted with her interest in the land, and her equity of redemption remains subject to the burthens, and to no greater burthens, than she undertook it should be subject to, when she joined in the mortgage to Maclennan.

Having had notice of the prior mortgage at the time she entered upon her original liability, any title acquired by her subsequently, even though it should come through an innocent purchaser like Maclennan is subject to the infirmity originally attaching to her connection with the transaction: Story's Equity Jurisprudence, sec. 410.

In whatever shape the question can be conceived as arising, the result must in my judgment be the same. Had Rosanna Gray instead of giving a mortgage on her property given merely a bond to Maclennan, then Coughlin on redeeming him would have been entitled to an assignment of the bond as well as the mortgage; his equity would be superior to hers because she had notice of his rights when she gave the bond; and in the same way had she paid off Maclennan and taken an assignment of his mortgage, she would in her turn have been liable to be redeemed by Coughlin, who would have been entitled to reassert all his original rights against her when once the only obstacle to his doing so, viz. the rights of Maclennan acquired by virtue of the Registry Act, had been removed.

Judgment.

STREET J.

In my opinion the appeal should be allowed with costs. The amount found due to Coughlin by the Master's report should be paid out of the money in Court together with his costs of the appeal from the Master's report, and Rosanna Gray should be declared entitled to the balance if any. The other questions raised by the appeal become immaterial in this view of the case.

Appeal allowed with costs.

IN THE MATTER OF THE CENTRAL BANK OF CANADA.

BAINES'S CASE.

*Company—Banks and banking-- Winding-up Act—Subscription for shares—
Transfer of shares—Shareholders within one month of suspension—R.
S. C. ch. 120, secs. 20, 29, 70, 77.*

One B. subscribed for twenty-five shares of the capital stock of the Central Bank of Canada, but did not at the time of subscription, nor within thirty days thereafter, make any payment thereon. About eight months later, however, payment was made by B. to the bank, and the bank accepted payment from him, of twenty per cent. of the amount subscribed, and subsequently dividend cheques were issued by the bank in favour of B., were endorsed by him, and were paid.

Per HAGARTY, C. J. O. When B. in fact paid after the prescribed time it could be properly treated as a new subscription, whether he again wrote his name or not. The substantial requirements of the statute are complied with by holding that as soon as the ten per cent. was paid, and not till then, the signature was complete.

Per BURTON and OSLER, JJ. A. Where there is an actually signed subscription contract, an actual receipt by the Bank from the subscriber of a payment on account of a number of shares equal to those mentioned therein, and a subsequent receipt by that person of dividends on that number, an acknowledgment of the subscription contract at a time within which a payment could be effectually made thereon, is to be presumed, and under the circumstances B. and the Bank were respectively estopped as against each other from denying that his subscription was re-acknowledged and that he had been a stockholder.

Per MACLENNAN, J.A. The payment not having been made within the prescribed time the original subscription was void, but the subsequent payment accepted by the bank, and the endorsement by B. of the dividend cheques, operated as a new subscription.

Judgment of BOYD, C., affirmed on these grounds.

No special directions as to the transfer of shares had been formally adopted by the directors, but the transfer book had been prepared for, and adapted to, the system of marginal transfer. One C. transferred certain shares in blank, subject, by marginal note, initialed by C., to the order of a broker, and subject by a subsequent marginal note, initialed by the broker, to the order of B. B. signed an acceptance of the shares immediately under the transfer in blank signed by C., and was entered in the books of the bank as the holder of the shares, the intermediate transfers to and from the broker being omitted. The transfer to B., and the acceptance by him, took place within a month of the time of the suspension of the bank.

Held, affirming the decision of BOYD, C., that this transfer and acceptance were a sufficient compliance with, or at least not in any way a violation of, the statutable provisions, and that B. became the legal holder of the shares, and was liable as a contributory.

Sections 70 and 77 of the Act must be read together, and make liable as contributories all those who hold shares at the time of the suspension of the bank, or who have held shares at any time within one month before the suspension.

THIS was an appeal from the judgment of BOYD, C., the Statement.
question involved being the liability of the appellant to be settled on the list of contributories in this matter.

Statement.

The Central Bank of Canada was incorporated by the Act 46 Vic. ch. 50 (D.), the capital stock being declared to be one million dollars in ten thousand shares of one hundred dollars each, and the Act providing that these shares should be vested in the several persons who should subscribe for them.

The Act also provided that certain persons therein named should be provisional directors, who should cause stock books to be opened in which might be recorded the subscriptions of such persons as might desire to become shareholders in the bank.

The Act also provided that as soon as \$500,000 of the capital stock was subscribed, and \$100,000 was paid thereon, the provisional directors might call a meeting of the subscribers, who at such meeting were to elect seven directors having the requisite stock qualification, who were thenceforth to direct the affairs of the corporation, assume the charge of the stock books, and remain in office for a year.

This Act further provided that the Banking Act and the Acts amending that Act were to be applicable to the bank.

Soon after the passing of the Act stock books were opened by the Provisional Board, and in one of these books, on the 29th of July, 1883, one Boulton subscribed for twenty-five shares, the following being the form of subscription :

(See opposite page.)

SUBSCRIPTION BOOK.

We, whose names are hereunto subscribed, agree to become stockholders in the above named Central Bank of Canada, and to take the number of shares set opposite our respective names. And we do severally, each for himself, his heirs, executors, and administrators, and not jointly, or the one for the other, agree with the said bank and the directors thereof, to make such payment thereon, and do all other matters and things in relation thereto as required by the Act of Incorporation, or the banking Acts of the Dominion, or that may be ordered by the Board of Directors of the said bank, and to be subject to, and agreeing to be bound by the present or any future by-laws or resolutions of the said bank, or the directors thereof.

Date.	Signature.	Seal.	Residence.	Addition.	Amount.	Amount in Writing.	No. of Shares.	No. of Shares in writing.	Witness.
1883. July 29.	A. Boulton.	O	Toronto	Barrister....	\$2500	two thousand five hundred.	25	twenty-five.	R. W. C. & Co.

Statement.

Statement.

On the 10th day of January, 1884, a meeting of the Provisional Board of Directors was held, and the amount of stock taken to that date was stated to be \$329,000. A resolution was carried that the shares as subscribed by the persons whose names were signed in the different stock books of the bank should be allotted to them respectively to the amounts set opposite their respective names.

The following resolution was also carried :

“That it being desirable to commence the organization of the bank without further delay, the directors agree to take up (in addition to their present holdings) the balance of the stock unsubscribed up to \$500,000 (five hundred thousand dollars) in trust to hold the same for such persons as may desire to subscribe for stock, and such subscriptions by directors in trust shall be cancelled or transferred pro rata so as to reduce or cancel each holding in proportion, it being understood that no calls are to be payable on such trust holding until such time as the stock is transferred to or taken by other parties.”

This method of completing the subscription of shares up to the required sum of \$500,000 was adopted, and the bank was organized immediately afterwards, and went into operation on the 1st March, 1884.

No payment was made by Boulton in respect of his subscription until the 1st day of March, 1884, when \$500 were paid by him to and accepted by the bank, this amount being placed to his credit in the stock ledger as a payment of twenty per cent. on twenty-five shares. Subsequently dividend cheques were issued by the bank in favour of Boulton, payable to his order, expressed to be in respect of these twenty-five shares, and were endorsed by him and paid, and on the 31st day of October, 1887, five of these shares were transferred by Boulton to one Cochran, and duly accepted by him in the stock books of the bank.

No special form of transfer had been adopted by the directors, but the transfer book was prepared with marginal notes in the form known as marginal transfers.

In the transfer book of the bank was the following Statement.
entry :

SUBJECT TO THE ORDER OF FOR VALUE RECEIVED from
Cox & Co.
(Signed) R. C. I, Robert Cochran, of Toronto, do here-
by assign and transfer unto of
five shares (on each of which
has been paid one hundred dollars)
amounting to the sum of five hundred
dollars, in the capital stock of the Cen-
tral Bank of Canada, subject to the
rules and regulations of the said bank.

SUBJECT TO THE ORDER OF WITNESS my said hand at the said
C. C. Baines.
(Signed) C. & Co. bank, this first day of November, one
thousand eight hundred and eighty-
seven.

Witness : (Signed) F. W. TROUNCE.

(Signed) ROBERT COCHRAN.

SUBJECT TO THE ORDER OF I do hereby accept the foregoing as-
signment of five shares in the stock of
the Central Bank of Canada, assigned
to me as above mentioned, at the bank
this fourth day of November, one
thousand eight hundred and eighty-
seven.

(Signed) C. C. BAINES.

It was admitted that the initials "R. C." were those of Robert Cochran, and signed by him, and that the initials "C. & Co." were those of Cox & Co., and signed by them. After the suspension of the bank Baines transferred the shares to Cox & Co.

The bank suspended payment on the 15th of November, 1887. On the 3rd of December, 1887, a petition for a winding-up order was presented, and on the 16th of December, 1887, a winding-up order was made. The appellant was settled on the list of contributories by the Master in Ordinary in respect of the five shares above

Statement. referred to, and upon appeal to BOYD, C., the finding of the Master was affirmed. See 16 O. R. 293.

From this judgment this appeal was brought, and came on to be heard before this Court (HAGARTY, C.J. O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 29th and 30th of January, 1889.

A. C. Galt, for the appellant. Owing to the failure of Boulton to pay at least ten per cent. on the amount subscribed for, at the time, or within thirty days after the time, of subscription, his subscription became void. The directors had no power to allot shares in that condition, and the subsequent payment could not revive the subscription which had thus become void: *Maxwell on Statutes*, p. 482; *La Banque Jacques Cartier v. La Banque D'Epargne*, 13 App. Cas. 111; *Re Standard Fire Insurance Co.*, 12 A. R. 486; *Ashbury v. Riche*, L. R. 7 H. L. 653. Even if the shares were legally vested in Boulton they were never legally transferred to the appellant, the alleged transfer not being in accordance with the statute, and therefore being invalid: *Murray v. Bush*, L. R. 6 H. L. 37; *Colonial Bank v. Hepworth*, 36 Ch. D. 36; *Société Generale de Paris v. Walker*, 11 App. Cas. 20; *Nanney v. Morgan*, 37 Ch. D. 346; *Merino's Case*, L. R. 2 Ch. 596. In any event Boulton alone could properly be settled on the list of contributories, he being the holder of the shares at the commencement of the month before the suspension of the bank.

W. R. Meredith, Q.C., for the respondents. Until the ten per cent. was paid the subscription was not legally complete, but it was not void, and it became complete in all respects as soon as the payment was made and accepted. At any rate the acceptance of dividend cheques by Boulton, and his endorsement of them, were sufficient to constitute him a shareholder. The transfer in marginal form is good, no special mode of transfer having been prescribed by the directors, and this mode containing all essentials. Sections 70 and 77 of R.S.C., ch. 120, must be read together.

April 30th, 1889. HAGARTY C.J.O. :—

Judgment.

HAGARTY
C.J.O.

The first objection to the Chancellor's judgment is, shortly, that the twenty-five shares of which the five in question form a part, were never lawfully vested in Boulton, the ten per cent. not being paid within thirty days of subscription. I think this is fully answered. When Boulton did in fact pay after the prescribed time, it can be properly treated as a new subscription, whether he again wrote his name or not. It was accepted by the bank, and I am satisfied that Boulton then lawfully became a shareholder, and was duly entered as such in the stock ledger.

I fully adopt the learned Chancellor's decision on this point, and the opinion of Gwynne, J., referred to, is very clear. I think his decision on this point should be supported.

I think we fully satisfy the substantial requirements of the statute by holding that as soon as the ten per cent. was paid, and not till then, the subscription was complete. I cannot think a fresh signature was necessary. The payment was made on the already existing one.

We are not dealing with any question on this point between the bank and Boulton, if the former had refused to accept his money as being paid too late. The bank fully accepted him as a shareholder, and I can hardly see how we can hold that he is not one, as to the double liability, for the protection of the public.

If the objection be sound, it would be equally so if Boulton had gone on receiving dividends for ten years, and he could have repudiated liability when the crash came; as it is, he acted as owner in transferring to Cochran.

The Bank Act (1871) 34 Vic. ch. 5, provides:

Section 18. (R. S. C., ch. 120, sec. 20). No shares shall be held to be lawfully subscribed for unless ten per cent. on the amount subscribed for be actually paid at the time, or within thirty days after the time of subscribing.

Section 19. (R.S.C. ch. 120, sec. 29.) No assignment or transfer shall be valid unless it be made and registered and

Judgment.

HAGARTY
C.J.O.

accepted by the party to whom the transfer is made in a book to be kept by the directors for that purpose.

Section 20. (R. S. C. ch. 120, sec. 30). A list of transfers registered each day in the bank books, shewing the parties to the transfers, shall be made up each day.

The assignment of shares is to be according to such form as the directors may appoint.

We have no evidence of any special or formal adoption of a form of transfer beyond what appears in the transfer book produced.

But the transfer book appears to be specially prepared and adapted to the system or practice of what are called "marginal transfers," as we find twice printed in the margin of each form, the words "subject to the order of."

The five shares had been transferred by Boulton to Cochran, and duly accepted by the latter on 31st October, 1887. Then on the 4th November following we find this transfer (the learned Judge read the transfer set out at p. 241, and continued):

The Chancellor says:

"The practice appears to have been adopted in the books of this bank of dealing with the shares in the way now objected to, technically called 'marginal transfer.' The seller placed his shares in the hands of a broker by means of a transfer in blank, which, by a marginal note, is subject to the order of the broker. This marginal note the broker initials. The broker thereafter having negotiated a sale, the purchaser then signed in the book an acceptance immediately under the transfer so signed in blank by the seller. This becomes perfectly certain on the completion of the transaction, the intermediate dealing of the broker being omitted from any extended record in the bank books."

It appears that Mr. Baines got these shares through Cox & Co., brokers, he also being a broker. Must we not read the transfer in substance thus:

I, Robert Cochran, do hereby assign and transfer, subject to the order of Cox & Co., five shares, &c., &c., and we

Cox & Co., order same to be subject to order of C. C. Baines; and then follows the acceptance signed by Baines as "assigned to me as above mentioned."

Judgment

HAGARTY
C.J.O.

I cannot see why such a transfer and acceptance should not be held to be a sufficient compliance with, or at least not in any way a violation of, any statutable provisions.

I think the acceptance is complete and unqualified. The registered owner of the shares (Cochran) signs the transfer with the words incorporated or to be read into it, and the transferee directly accepts it in the form in which it is made. There was the clear intention to transfer, and the equally clear intention to accept.

They were considered by the transferee clearly as his, for we find that he sold and transferred them to Mr. Cox by power of attorney after the books were closed and the bank suspended.

I do not consider that it is necessary to refer to the class of cases in which it was considered whether a person by his conduct had as it were estopped himself from denying his ownership, as I think the transfer and acceptance are sufficient.

As to the remaining point on the effect of the clause as to thirty days before suspension I think the decision is right, and the two sections 70 and 77 of R. S. C. ch. 120 must be read together.

I think the liquidator must take the shareholders as they appear in the books at suspension, and at that period the appellant appeared as the owner of these shares.

Section 77 was, it is presumed, aimed at a practice very well known, of transfers made by parties in anticipation of financial difficulties, with the possible result of creating worthless instead of solvent shareholders. The transferors within the thirty days are responsible, and their rights against the transferees are saved by the statute.

I do not think that any of the objections taken by Mr. Galt, in his very careful and able argument, are entitled to prevail. I have examined the authorities to which he referred. It appears to me that the tenour of decision

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HAGARTY
C.J.O.

throughout the books is to prevent persons who have unequivocally signified their intention of accepting shares in companies, taking the risk of the good or evil fortune which may await the adventure, from raising objections to some omission or lack of observance in the formalities prescribed either by statute or deed of settlement. (See the observations of Lord Cairns, *Langer's Case*, 18 L. T. N.S. 67, at p. 68.)

It is necessary for the fair protection of the public that there should be no doubt as to the existence of a body of shareholders who allow their names to appear as such in the records of the association.

If some of the arguments addressed to us were to prevail, it would be possible for persons who had as shareholders received dividends in a company, and continued for years as apparent shareholders, to claim to be discharged from liability from the absence of some merely formal provision in the chain of title to the stock.

I do not think that a case like this requires any rule as to estoppel, or long acquiescence, to support the liability.

Nor do I consider that it is or should be easy to dispense with plain legal requirements. But we have here stock existing in the ownership of a named shareholder, and, as I think, legally transferred by him to, and accepted by, the appellant, and however it may be a subject of regret that he, with so many other innocent stockholders, have to suffer for the evil conduct of others, the liability cannot be evaded.

OSLER J.A. :—

I think the Chancellor's judgment should be affirmed, as I agree with him that the shares in respect of which the appellant has been fixed on the list of contributories were legally vested in Boulton, and were afterwards legally transferred to the appellant.

The private Act of the Central Bank, 46 Vic. ch. 50, sec. 2, (D.), enacts: that the shares into which the capital is

divided shall be, and they are hereby vested in the several persons who shall subscribe for the same.

Section 20 of "The Bank Act," R. S. C., ch. 120, enacts: that the shares shall be paid in by such instalments and at such times and places as the directors shall appoint:

"Provided always, that no share shall be held to be lawfully subscribed for unless a sum equal to at least ten per centum on the amount subscribed for is actually paid at the time of or within thirty days after the time of subscribing."

I do not doubt that at the expiration of thirty days after the time when Boulton originally subscribed, his subscription contract was at an end, and he ceased to be a shareholder, by reason of the nonpayment of the ten per cent. instalment of the amount subscribed as required by the Bank Act. Neither party could have enforced the subscription against the other. The subscriber had none of the rights, and was subject to none of the liabilities of a shareholder.

That was the point decided in *The Standard Fire Insurance Co.—Kelly's Case*, 12 A. R. 486, under a statute containing provisions somewhat similar to those above set forth, except that the proviso was rather stronger in denying any effect whatever to the subscription until payment of the deposit; providing that no subscription should be *legal or valid until* ten per cent. should have been actually and *bond fide* paid thereon. In that case there was nothing but the original subscription. Nothing had ever been paid thereon, and therefore the subscriber had never become a shareholder. The facts here are very different. Boulton had, no doubt, ceased to be a shareholder. His subscription was lifeless, but it nevertheless remained in the subscription book. All we can see is that he and the bank must have come together again in some way, for we find him in March, 1884, paying a deposit of twenty per cent or \$500 upon twenty-five shares, and we also see that his signature to the old subscription contract for a similar number remains unobliterated. I attach no importance to

Judgment.

OSLER
J.A.

Judgment.

OSLER
J.A.

the previous allotment of shares to him by the directors ; it was, at the time it took place, ineffectual for any purpose, and probably would in no case be necessary, the shares being by force of the Act vested in the subscriber. But after the payment of the deposit Boulton received from the bank, as a shareholder, several dividends on the shares on which it purported to be paid, the cheques for which were produced and admitted on the argument of the appeal. It appears to me that where we find an actually signed subscription contract, an actual receipt by the bank from the person who subscribed it, of a deposit or payment on account of a number of shares equal to those mentioned therein, and a subsequent receipt by that person of dividends on that number, we must necessarily presume an acknowledgment of the subscription contract at a time within which a payment could be effectually made upon it ; in other words, that it was, as there can be no doubt it might have been, revived, and re-acknowledged, and acted upon ; just as in *National Bank of Australasia v. Cherry*, L. R. 3 P. C. 299, the mortgage security, void by the statute at the time it was given, was galvanized into life by a subsequent agreement made at a time when it might lawfully be taken.

I think that Boulton and the bank were under the circumstances respectively estopped as against each other from denying that his subscription was re-acknowledged, if subscription was then essential, and that he became a shareholder in respect of the twenty-five shares.

Five of these shares, being those now in question, were subsequently duly assigned to R. Cochran, accepted by him, and registered by being entered in his name in the stock ledger, the only mode of registration adopted by the bank, or, apparently, provided for by statute. Cochran then executed an assignment of them, in the body of which the name of the transferee was not inserted, but in the margin we find the words "subject to the order of Cox & Co.," signed by the transferor with his initials.

On the delivery of this to Cox & Co., they became the

equitable owners of the shares. They might have accepted the transfer in their own names, or they might name some one else as the transferee. The whole instrument must be read together, and treated as an assignment to the nominee or appointee of Cox & Co. They named and appointed Baines as the transferee by a marginal memorandum on the same instrument signed by them. Whether Baines could in like manner have passed it on to another person it is unnecessary to determine. Unfortunately for himself he executed at the foot of the transfer a formal acceptance of "the foregoing assignment," and procured himself to be duly entered in the stock ledger as the proprietor of the shares. When this was done I think there was an effectual transfer from Cochran to Baines duly "made, accepted and registered," within the meaning of section 29 of the Bank Act. It follows that he became the legal holder of the shares by a contract to which he and Cochran, and the bank were parties, and being so at the time of the suspension of the bank, he was, under section 70 of the Bank Act, liable to be placed on the list of contributories.

Judgment.

OSLER
J.A.

BURTON J.A. concurred with OSLER J.A.

MACLENNAN J.A. :—

It is admitted that if the appellant is a shareholder, the five shares he is alleged to possess are five of the twenty-five shares subscribed for by Mr. Boulton on the 29th July, 1883, and it is contended by the liquidators that these five shares passed by regular assignment through one or more intervening holders to the appellant, and that he was the lawful holder at the time of the commencement of the winding-up.

It is admitted that no payment was made by Mr. Boulton in respect of his shares until the 1st March, 1884, when \$500, equal to 20 per cent., was paid thereon, and it is contended by the appellant that no payment having been made at the time, or within thirty days of the date of

Judgment.
MAOLENNAN
J.A.

subscription, Mr. Boulton's subscription was illegal and void under section 18 of the Bank Act; that the shares alleged to be held by him never had any legal existence, and that the appellant could acquire no shares as his assignee.

It is further contended by the appellant that even if Boulton had been a legal shareholder the alleged transfers are defective and insufficient to vest any shares in the appellant.

The sections of the Bank Act of 1871 which seem to bear upon the first question are the following:

Sec. 5. (R. S. C. ch. 120, sec. 7.) The capital stock may be increased by the shareholders in annual or general meeting.

Sec. 6. (R. S. C. ch. 120, sec. 8.) Any of the original unsubscribed capital stock, or the increased stock, shall be allotted to existing shareholders *pro rata*, at such rate as the directors may fix, and any not taken up within three months by shareholders may be offered to the public.

Sec. 7. (R. S. C. ch. 120, sec. 6.) No bank hereafter incorporated * * shall issue notes or commence business until \$500,000 of capital have been *bond fide* subscribed, and \$100,000 have been *bond fide* paid up, nor until it has obtained from the Treasury Board a certificate to that effect.

Sec. 18. (R. S. C. ch. 120, sec. 20.) The shares shall be paid in as the directors appoint, and executors, &c., paying instalments on the shares of deceased shareholders shall be indemnified for so doing: Provided always that no share shall be held to be lawfully subscribed for, unless a sum equal to at least ten per centum on the amount subscribed for is actually paid at the time of or within thirty days after the time of subscribing.

Sec. 34. (R. S. C. ch. 120, sec. 22.) The directors may make calls on the shareholders upon the shares subscribed for by them, as they find necessary, and may, in the corporate name of the bank, sue for the calls, or forfeit the shares. An action may be brought for calls, and it shall

not be necessary to set forth the special matter, and to entitle the directors to recover it shall be sufficient to prove by any one witness that the defendant at the time of making the call was a shareholder in the number of shares alleged, &c.

Judgment.

MACLENNAN
J.A.

Sec. 35, (R. S. C. ch. 120, sec. 23) authorizes a sale of shares for unpaid calls, and the execution of a transfer by an officer of the bank, and the transfer then accepted is to be as valid and effectual as if executed by the original holder of the shares.

The first question is, whether Mr. Boulton ever became a shareholder in the bank. If he had paid the ten per cent. required by section 18 of the Bank Act at the time of his subscription, or within thirty days afterwards, there could be no question about it, for the Act incorporating the company expressly vests in the subscribers the shares subscribed by them. But then he did not make any payment within the thirty days, nor until long afterwards, namely, on the 1st of March, 1884. The only evidence before us is, that on that day Mr. Boulton is credited on the bank ledger against his twenty-five shares with the sum of \$500, and the case was argued before us on the assumption that on that day Mr. Boulton made that payment on his shares. The learned Chancellor held that such a payment having been made, and having been accepted by the bank, made good the original subscription, and that Mr. Boulton thereby became a shareholder of the bank. He follows the decision of Mr. Justice Gwynne, in *Port Dover v. Grey*, 36 U. C. R. 425, and considers that the principle which ought to govern the case is found in *East Gloucestershire R. W. Co. v. Bartholomew*, L. R. 3 Ex. 15, and *McEuen v. West London Wharves Co.*, L. R. 6 Ch. 655. With great respect I am unable to take this view. To do so would, in my humble judgment, fritter away the words of the statute, and hold in effect that the time limit was immaterial. I do not think we can get rid of the effect of clear words in that way. The words are that "no share shall be held to be

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MACLENNAN
J.A.

lawfully subscribed for unless," &c. I cannot conceive of words more clearly indicating that a subscription is to go for nothing whatever unless payment is made within the time. When the statute says it shall not be lawfully subscribed for unless payment is made within thirty days, what is that but to say it shall not be lawful if payment is made after the thirty days ?

By the Act of incorporation the corporators of the company are to be the shareholders, and the shares are vested in the subscribers. Subscription therefore is the essential thing. Without subscription of some kind there can be no share. I think this is quite apparent from the whole scope both of the general and the special Acts. This is so at all events, until the \$500,000 is subscribed which is necessary to enable them to organize, and to commence business. It may be true that after the thirty days were past, Mr. Boulton could have gone to the directors and have asked to subscribe *de novo*, and that he might have re-acknowledged the old signature, and re-delivered it as his deed. But I think it would be most dangerous, in the absence of anything of that kind being done, to hold that the mere payment of money on account of the old subscription had the effect of giving it validity, and setting it up *de novo*. Originally it had been a sealed instrument, a deed. By the express words of the statute it was "unlawful," and so extinct, void : *Bank of Toronto v. Perkins*, 8 S.C. R. 603 at pp. 611, 612, 625, 631, and the contention is, that the payment of the money without more operated as a re-acknowledgment and re-delivery of the deed. He subscribed on the 29th July. The statute said unless he paid on or before the 28th August, the subscription would become unlawful. He did not pay on or before the 28th August, so the subscription became unlawful. But he paid on the 29th, and it is said his subscription became lawful again.

In my humble judgment we cannot take such liberties as that with the statute. In the case before Mr. Justice Gwynne it was not really necessary to determine the point, because the difficulty had been removed by an amending

Act, and looking at the clause in question there, which was part of a much longer clause, the learned Judge might well have come to the conclusion that the effect the Legislature had in view required a modified or qualified construction to be put upon it. In the present case I think subscription is an important, a cardinal, act in the organization and establishment of the company, and it ought not to be left to inference whether there is such a thing or not.

Judgment.
MACLENNAN
J.A.

How important subscription was regarded by the Legislature is apparent from many of the other sections, both of the Act of Incorporation and the general Bank Act. Under the Act of Incorporation it is in the subscribers that the shares are declared to be vested; books are to be provided wherein to record the subscriptions; as soon as half a million of stock is subscribed, &c., a meeting is to be called of the subscribers to elect directors, &c.

By the Bank Act provision is made for increasing the capital, and for disposing of the original unsubscribed capital. Both the new capital and the original unsubscribed capital are to be allotted to existing shareholders *pro rata*, before it can be offered to the public, and it is *bond fide* subscription of half a million, and payment thereon of ten per cent., which is made the prerequisite to a certificate enabling the bank to commence business.

I think it must be held that Mr. Boulton's subscription by the force of the statute became null and void by the default in making the necessary payment thereon within the time limited, that it was in effect swept out of existence, and that it could not be revived without some distinct act equivalent to a re-execution or re-delivery of the deed.

If there had not been anything else than the original subscription and the payment of the \$500 on the 1st March, 1884, I should have been unable to come to the conclusion that Mr. Boulton had ever been a shareholder in the bank, or that the shares in question had ever had a legal existence.

On the argument before us, however, a piece of evidence was brought forward for the first time, which had not been brought to the attention of the learned Chancellor.

Judgment.
MACLENNAN
J.A.

This was five dividend cheques issued from time to time by the bank in favour of Mr. Boulton, and payable to his order, expressed to be in respect of twenty-five shares of stock in the Central Bank standing in his name. These cheques are endorsed by Mr. Boulton, and I think the endorsement of his name upon these cheques satisfies the requirement of the statute of a subscription for the shares, and that he thereby became a legal holder of them. The resolution of the board of directors of the 10th January, 1884, may be regarded as an offer of these shares to Mr. Boulton, and all that was required to make him the holder of them, was some written acknowledgment over his signature, which is I think sufficiently secured by the endorsed dividend cheques.

Upon the other point I agree with the judgment of the learned Chancellor.

I think the transfer signed by Cochran may be read with the note in the margin, and that it means that he assigns the stock to Cox & Co., or to Cox & Co.'s nominee. Until there is an acceptance either by Cox & Co. or their nominee, the transfer is imperfect and inoperative to pass the shares, and as between Cochran and the bank he is still the shareholder. But as between Cochran and Cox & Co. the transfer signed by the former is evidence of a contract to sell the shares to the latter, and to transfer them to their appointee. Messrs. Cox & Co. appointed Baines to receive the shares, and when the latter signed the acceptance, the transfer, in my judgment, became complete and effectual according to the intention of the parties, and the shares became legally vested in Mr. Baines.

I think the assignment complies with the requirements of section 29 of the Bank Act, (R. S. C. ch. 120) which says that it shall be according to such form as the directors prescribe, and shall not be valid unless made, registered and accepted by the assignee in a book or books kept by the directors for that purpose.

I am, therefore, of opinion that the appeal should be dismissed.

Appeal dismissed with costs.

THE ONTARIO LOAN AND DEBENTURE CO. V. HOBBS.

Mortgage—Re-demise clause—Landlord and tenant—Right to distrain.

On the 31st of May, 1883, one D. mortgaged to the plaintiffs certain lands to secure the sum of \$20,000 then advanced by them to him. The advances were repayable as follows: \$500 on the 1st of December, 1883; \$500 in each of the months of June and December in each of the four following years; and \$15,500 on the 1st of June, 1888; together with interest at the rate of seven per centum per annum from the 1st of June, 1883, to be paid half-yearly on the 1st days of June and December in each year. The mortgage was made in pursuance of the Act respecting Short Forins of Mortgages and contained the following clause described in the margin as "Re-demise clause."

"And the mortgagees lease to the mortgagor the said lands from the date hereof until the date herein provided for the last payment of any of the moneys hereby secured undisturbed by the mortgagees or their assigns, he, the mortgagor, paying therefor in every year during the said term, on each and every of the days in the above proviso for redemption appointed for payment of the moneys hereby secured, such rent or sum as equals in amount the amount payable on such days respectively according to the said proviso, without any deduction. And it is agreed that such payments when so made shall respectively be taken and be in all respects in satisfaction of the moneys so then payable according to the said proviso."

The mortgage did not contain the statutory distress clause or the statutory clause providing for possession by the mortgagor until default, and it was not executed by the mortgagees. At the time it was given D. was himself in occupation of certain of the properties comprised in it of the annual rental value of about \$1,200 while the other properties comprised in it were in the occupation of tenants of D. and were producing an annual rental of about \$2,000. After the execution of the mortgage the properties continued to be occupied in the same manner by D. or his tenants and some payments under the mortgage were duly made by D. In 1887 the goods of D. on one of the properties comprised in the mortgage, and occupied by him, were seized under executions against him and sold, and the plaintiffs claimed that as landlords they were entitled to be paid out of the proceeds of the sale the amount due to them for the unpaid instalments of principal and interest of June and December, 1886.

Held, reversing the judgment of the Queen's Bench Division, that this claim was well founded, the relation of landlord and tenant having been validly created between the parties and the execution creditors in the absence of fraud not being entitled to complain.

Trust and Loan Company v. Lawason, 6 A.R. 286, 10 S.C.R. 679, distinguished.

THIS was an appeal from the judgment of the Queen's Statement Bench Division.

One David Darvill of the City of London, machinist, being the owner of certain properties in that city, applied to the plaintiffs for a loan on the security thereof, and obtained from them an advance of \$20,000, giving

Statement. them a mortgage bearing date the 31st of May, 1883, upon these properties. The mortgage contained, among others, the following provisions :—

“ Provided, this mortgage to be void on payment of twenty thousand dollars with interest at seven per cent. per annum as follows:—Five hundred dollars of the said principal sum to be paid on the first day of December next (1883); five hundred dollars on the first day of each of the months of June and December in each of the four following years: 1884, 1885, 1886, and 1887, and fifteen thousand five hundred dollars, being the balance of the said principal sum, on the first day of June, in the year eighteen hundred and eighty-eight. And the interest at the rate aforesaid, likewise of gold coin or its equivalent as aforesaid, on the unpaid principal from the first day of the month of June now, 1883, to be paid semi-annually on the first day of each of the months of June and December in each year until the said principal sum and interest shall be fully paid and satisfied. The first of said semi-annual payments of interest to become payable on the first day of December, in the year 1883, and taxes and performance of statute labor. The mortgagor, his heirs or assigns, having the privilege of paying one hundred dollars or any multiple thereof, not exceeding one thousand dollars on account of the said principal moneys in advance on the day of the date of any of the above-mentioned half-yearly payments.

“ The said mortgagor covenants with the said mortgagees that on default the mortgagees shall have quiet possession of the said lands.

“ And the said mortgagor doth release to the said mortgagees all his claims upon the said lands subject to the said proviso.

“ Provided that the said mortgagees, on default of payment for one month, may, on one month's notice, enter on and lease or sell the said lands.

“ And the mortgagees lease to the mortgagor the said lands from the date hereof until the date herein provided

for the last payment of any of the moneys hereby secured, Statement.
undisturbed by the mortgagees or their assigns, he, the mortgagor, paying therefor in every year during the said term, on each and every of the days in the above proviso for redemption appointed for payment of the moneys hereby secured, such rent or sum as equals in amount, the amount payable on such days respectively according to the said proviso, without any deduction. And it is agreed that such payments when so made shall respectively be taken, and be, in all respects in satisfaction of the moneys so then payable according to the said proviso. Provided always, and it is agreed, that in case any of the covenants or agreements herein of the mortgagor, his heirs, executors, administrators, or assigns, be untrue, or be unobserved or broken at any time, the mortgagees, their successors or assigns, may, without any previous demand or notice, enter on the said lands, or any part thereof, in the name of the whole, and take and retain possession thereof and determine the said lease."

The mortgage did not contain the statutory distress clause or the statutory clause providing for possession by the mortgagor until default, and it was not executed by the mortgagees. At the time it was given, Darvill was himself in occupation of certain of the properties comprised in it, of the annual rental value of about \$1,200, while the other properties comprised in it were in the occupation of tenants of his, and were producing an annual rental of about \$2,000. After the execution of the mortgage the properties continued to be occupied in the same manner by Darvill and his tenants, and payments under the mortgage were duly made by Darvill. In 1887, under executions of the defendants against him, his goods and chattels on one of the mortgaged properties occupied by him were seized and sold, and the plaintiffs claimed that under their mortgage they were entitled as landlords to be paid out of the proceeds of that sale, by way of rent, in priority to the payment of the claims of the execution creditors, the sums of \$1,077.50 and \$1,060.00 instalments due under the mort-

Statement.

gage in June and December, 1886. An interpleader issue was directed and was tried before Rose, J., on the 16th of September, 1887, and on the 22nd of September, 1887, judgment was delivered in favour of the plaintiffs, the learned Judge being of the opinion that the relation of landlord and tenant had been validly created.

On appeal by the defendants to the Divisional Court this judgment was reversed. (15 O. R. 440.)

The plaintiffs appealed and the appeal came on to be heard before this Court (HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.) on the 21st day of September, 1888, but before judgment was delivered, Patterson, J. A., was transferred to the Supreme Court of Canada and the appeal was re-argued before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 6th of March, 1889.

Moss, Q.C., and *A. O. Jeffery*, for the appellants. The relation of landlord and tenant is created by the mortgage, and the objections taken to the tenancy are untenable: *Ex parte Voisey*, 21 Ch. D. 442; *Re Willis*, *Ex parte Kennedy*, 21 Q. B. D. 384; *Daubuz v. Lavington*, 13 Q. B. D. 347; *Kearsley v. Philips*, 11 Q. B. D. 621. Nor is the lease, even if considered one for more than three years, void because not by deed. It is good in equity, and the equitable doctrine now prevails: *Furness v. Bond*, 4 Times L. R. 457; *Walsh v. Lonsdale*, 21 Ch. D. 9; *Allhusen v. Brooking*, 26 Ch. D. 559; *Re Maughan*, *Ex parte Monkhouse*, 14 Q. B. D. 956. Signature by the mortgagees is not necessary: *Morton v Woods*, L. R. 3 Q. B. 658; L. R. 4 Q. B. 293; *Re Threlfall*, 16 Ch. D. 274; *West v. Fritche*, 3 Ex. 216. Even if signature were necessary the instrument must be treated as signed, for execution of a lease could have been compelled, there being sufficient part performance. Clearly the mortgagees could not have ejected the mortgagor. He could successfully resist ejectment by showing the agreement which would then be enforced: *Re King's Leasehold Estates*, L. R.

16 Eq. 521. The occupation enjoyed and the payments made evidence the relationship. No formal demise and attornment are necessary, at all events to create a tenancy at will and this is sufficient: *Kearsley v. Philips*, 11 Q. B. D. 621; *Macdonell v. The Building and Loan Association*, 10 O. R. 580; *Finch v. Miller*, 5 C. B. 428; *Kelly v. Patterson*, L. R. 9 C. P. 681. The execution by the mortgagor of the mortgage containing the demise clause amounted to a covenant to pay the rent thereby reserved and operated as an attornment from the moment of execution: Woodfall's *Landlord and Tenant*, 13th ed. p. 159. The lands are vested in the company in fee subject to the proviso for redemption, and therefore they are entitled to make a valid lease for a term of years. This is not a demise for the whole period of the mortgagees' interest. The creation of the tenancy was for the purpose of better securing the plaintiffs. The mortgagor was solvent at the time and fraud is not charged. The parties themselves adopted the relationship and in the absence of fraud the execution creditors cannot dispute the position taken by their debtor, the mortgagor. The omission of the statutory distress clause shows clearly that the mortgagees intended to rely upon the higher right of distress under an actual tenancy.

W. R. Meredith, Q. C., for the respondents. The appellants have no right to the moneys claimed unless they can show themselves to have been landlords within the strict meaning of the Act, and even if the distress clause were good as between the mortgagor and the mortgagees, still it could not have any effect as against execution creditors unless the mortgagees were really landlords of the premises. If there be a lease then it is a lease at a rent equal to the amounts payable under the proviso for redemption. These payments are so large that they could not possibly be paid as rent and this shows clearly that no real tenancy was intended but simply a fictitious relationship. Besides the mortgagees could not lease to the mortgagor properties at the time in the occupation of his tenants. The mortgagees can only take additional security by means of the

Argument.

creation of a tenancy if the rent reserved be fair and reasonable and a real and not ostensible contract: *Trust and Loan Co. v. Lawrason*, 6 A. R. 286, 10 S. C. R. 679; *Ex parte Jackson*, 14 Ch. D. 725. Even if there be a good lease as between the parties still it is void as against creditors because the effect of such a transaction is to possibly prefer the mortgagees in case of future difficulty, although at the time of the mortgage there is no insolvency and no present intention to prefer: *Ex parte Williams*, 7 Ch. D. 138; *Re Stockton Iron Furnace Co.*, 10 Ch. D. 385. Attornment and occupation are conclusive but there is nothing of that kind here. The clause in question here certainly does not create a tenancy, and is not even evidence of a tenancy: *Ex parte Voisey*, 21 Ch. D. 442. An agreement for a lease is not sufficient: *Swain v. Ayres*, 21 Q. B. D. 289.

Moss in reply.

April 30th, 1889. HAGARTY C.J.O.:—

In *Morton v. Woods*, L. R. 3 Q. B. 658, L. R. 4 Q. B. 293, it was held that although the mortgage was not executed by the mortgagees, yet as the mortgagor had attorned and occupied after the deed was executed by him, the relation of landlord and tenant was created.

West v. Fritche, 3 Ex. 216, is cited. There was an attornment in the deed but no execution by the mortgagee. Parke, B. said "We all think that the subsequent occupation connected with the covenant (*quære* the attornment?) constituted the relation of landlord and tenant, so that the mortgagee could distrain." The receipts there were for interest not for rent.

Blackburn, J. says (in *Morton v. Woods*) "It cannot be doubted that the deed was intended to operate as an immediate lease, the object being to give the defendants an additional remedy by distress."

The judgment was affirmed in appeal.

Morton v. Woods was discussed and explained in *Re Threlfall*, 16 Ch. D. 274, and followed in substance. It does not appear whether the mortgagee did or did not execute the deed, but there was an attornment clause at a fixed annual rent. James, L.J. says "We are asked in this case, not to construe a deed, but to contradict it, for the purpose of entirely destroying the intention of the parties to it. The mortgagor was left in possession of the property and was thereby enabled to give a power of distress to the mortgagee. The attornment clause was in the common form, and was intended to create the relation of landlord and tenant between the parties." Referring to *Morton v. Woods*, he says, "In that case there was no actual demise, but for the purpose of giving effect to the manifest intention of the parties it was held that a tenancy at will had been created."

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 HAGARTY
C.J.O.

Ex parte Punnett, 16 Ch. D. 226, follows *Morton v. Woods*, and declares it to be supported by *In re Stockton Iron Furnace Co.* 10 Ch. D. 335.

Jessel, M.R., said he was not previously aware of *Morton v. Woods*.

James, L.J. says "I am startled by it." Counsel argued that the question there was whether the mortgagee had the same right as if an actual tenancy had been created.

Lush, L. J. "In *Morton v. Woods*, the estoppel was not by deed, for the deed had not been executed by the mortgagee, it was an estoppel *in pais*." The Court followed the law laid down in such cases as *Morton v. Woods*.

Ex parte Jackson, 14 Ch. D. 725, mortgage for £7,090, attornment clause to hold as tenant from year to year at annual rental of £8,000 payable quarterly in advance, with a declaration by the mortgagor that he had paid 1s. on account of rent. Bacon, C.J., held in favour of the right to distrain, following *Ex parte Williams*, 7 Ch. D. 138, and *In re Stockton Iron Furnace Co.*, 10 Ch. D. 335.

The Court of Appeal reversed his decision, holding that such a rent was unreasonable and excessive; that it was not a real rent but a fictitious payment under the name of

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HAGARTY
C.J.O.

it was not intended to be acted upon between the parties at all and was only a device to evade the bankruptcy law. * * That attempted evasion, that want of *bona fides* with regard to the bankruptcy laws must exist, if at all, at the moment when the contract is made. * * * At the time of making the contract they must have contemplated evading or attempting to evade the fair distribution of the mortgagor's property in case of his bankruptcy. That seems to me to be the true proposition and the true principle of law which is laid down in *Ex parte Williams*." He also fully discusses *Ex parte Jackson* and *In re Stockton Iron Furnace Co*.

Jessel, M.R. adds at the end that he fully agrees with Lord Justice Brett's judgment.

During the argument the learned Master of the Rolls, as to the non-execution by the mortgagees, remarked that he never heard "of an attornment clause being executed by the landlord."

Throughout the case both before the Chief Judge and in Appeal, the agreement by the mortgagor for a future tenancy on a certain event is treated and designated as "an attornment." There does not appear to have been any notice to treat him as a tenant from a certain time as the Court held was necessary in *Clowes v. Hughes*, L.R. 5 Ex. 160.

I think we must accept *Ex parte Voisey* as the latest and most definite declaration of the law, and as I understand it, it may solve most of the questions argued before us.

When the mortgage was given (1883) there was no Bankrupt or Insolvent Act in force, nor legislation providing for the equal distribution of insolvent debtors' estates, nor any insolvency existing or apparently impending on the mortgagor's part. I do not see, therefore, why the parties were not at liberty to make such a contract as this between themselves.

The Court pointedly referred to such cases as *Ex parte Williams*, 7 Ch. D. 138, where the principal money was stated as rent, that the amount being so excessive raised

the presumption that a real rent was not intended but a fraud upon the bankrupt laws.

Judgment.

HAGARTY
C.J.O.

I think this objection fails.

Then as to the legal creation of a tenancy. As already remarked there is no expressed mention of "attornment" as such. The mortgage here contains no re-demise clause in the ordinary form, but the following:—(The learned Judge read the clause, p. 256, and continued:)

This express provision of demise I think puts an end to any implication to be drawn from other clauses, such as that on default the mortgagees shall have quiet possession of the lands or as to entering, leasing or selling on default after notice.

On the face of the mortgage, I think the only right or claim to continue in occupation of the premises rests on this provision. The mortgagor specially releases all his claims on the land subject to the proviso.

His right to remain, rests, therefore, on this express demise to him, creating the relation of landlord and tenant from the date of the conveyance till the date of the last payment therein provided for, he paying therefor, in every year during the term on those named days such rent or sum as equals the named amounts.

This, in my opinion, on the authority of the cases, amounts to a sufficient attornment by the tenant.

The estoppel on the tenant may be considered not as created by the deed alone, but by the subsequent occupation under its terms. I again refer to *West v. Fritche*, 3 Ex. 216, and the references to it in *Morton v. Woods*, L. R. 3 Q. B., 658, L. R. 4 Q. B. 293.

It seems to come within Sir Geo. Jessel's decision in *Ex parte Voisey*, 21 Ch. D. 442, at p. 456, that there was "an agreement for a tenancy, an attornment to the legal owner by deed executed by the tenant in possession, and delivered to the legal owner, and an estoppel *in pais* which would prevent the tenant from denying the tenancy."

We have not to deal with any question as to the right to seize other goods than those of the mortgagor.

Judgment.

HAGARTY
C.J.O.

I think the parties, apart from objections arising under bankrupt or insolvent legislation, had a right to make this contract between themselves, that it expresses their true bargain, that a tenancy was created and that the mortgagees had a right, under the Statute of Anne, to claim payment of rent, and the appeal must be allowed.

BURTON J.A. :—

The defendants as execution creditors have seized certain property of the mortgagor, to the proceeds of which they are entitled unless the plaintiffs can establish that the relationship of landlord and tenant existed entitling them to distrain for rent at the time of the seizure. The onus is upon them. Have they satisfied it ?

In all the cases cited by the learned Chief Justice (I except for the present *Ex parte Voisey*, 21 Ch. D. 442, which I propose to discuss separately) there was an attornment clause, as it is usually termed,—but what would be more appropriately called an admission under seal of an existing tenancy,—and in terms which dispensed with any proof of a demise, and a great deal of the legal lore to be found in some of these cases appears to have been brought into the argument quite unnecessarily when that fact is borne in mind.

If there had been any such admission by the mortgagor in this case, he would have been estopped from denying the tenancy or the right of the mortgagees to distrain, and in my view the only question here is what term did the parties intend that the mortgagor should take from the mortgagees. If a term of five years, during which the mortgage was to run, then the intended demise failed as any such lease is void at law unless by deed ; if at will then the mere assent of the parties and occupation under it amounted to a sufficient demise.

I was at first under the impression that the intention of the demise clause was to create a term of five years and being void for want of execution of the deed by the mort-

gagees, no such term was created, and there being no admission under seal by the mortgagor of an existing tenancy, there was no power to distrain.

Judgment.

BURTON
J.A.

I cannot at all agree that the words 'he the mortgagor paying therefor, etc.' can have any such effect. They would, on the lease being completed by the execution of it by the lessors, amount to an implied covenant to pay the rent under that lease, but had at the time no present force or validity, and cannot to my mind by any stretch of ingenuity be construed into an admission of a valid lease for the term thereby proposed to be created. The demise clause was inserted for the benefit no doubt of the mortgagees who could have made it effectual at any time by the execution of the mortgage, but I am not prepared to admit that the mortgagor could have obtained specific performance. It might have been otherwise if at the time of the execution of this mortgage he had been out of possession and had entered under the instrument—that might have been perhaps regarded as part performance—but he was in possession as owner, and although he became after the execution of the mortgage a tenant at sufferance, he was rightfully in possession until that tenancy was determined. His possession therefore is not necessarily attributable to the demise, but to his right as owner to remain in possession until the determination of this will. But when that demise is fully considered in connection with the proviso, I think the true intention of the parties to be gathered from the two together, was that the mortgagor should be a tenant at will only, with the understanding that he should be at liberty to remain for the full term of five years, should the will not be determined before. If that be so, a sufficient tenancy was created by the mortgagor remaining in possession with the consent of the other and no attornment clause would be necessary.

The case of *Ex parte Voisey*, 21 Ch. D. 442, is mainly of importance as explaining the principle of law laid down in such cases as *Ex parte Williams*, 7 Ch. D. 138, and *In re Stockton Iron Furnace Co.*, 10 Ch. D. 335, but I

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J.A.

think it is also important as indicating the distinction in mortgages of this kind between a demise not required to be by deed and one requiring that formality, which, therefore, would have to be established either by proof of the execution of the mortgage by the mortgagees, or by an express admission under seal, signed by the mortgagor, of the existence of such a tenancy, and its terms, which would be as good evidence of such a demise as proof of the lease itself.

In that case, as in this, the tenancy was not one which required to be by deed, but was valid without deed, but there was also in the most express terms, an agreement by the mortgagor, in certain events which happened, to become tenant to the mortgagees at a certain monthly rent. What better evidence of a tenancy could there be?

Upon the other questions argued:—I have on more than one occasion expressed my opinion that generally speaking, although the rent may appear to be out of proportion to the annual value of the premises, that in itself will be no objection unless the Court is satisfied that it is a mere device and contrivance for evading the bankruptcy or insolvency laws, but apart from that, I understand Mr. Meredith to contend that there were circumstances in this case which lead to the inference that it never was the intention of the parties to create the relation of landlord and tenant, though they used words having that effect. It may well be, as suggested by Sir George Jessel in *Ex parte Voisey*, 21 Ch. D. 442, that the relation was not created in law; and Lord Justice Cotton in the same case expresses the same idea in these words: "It is undoubted that a mortgagee may enter into a contract with his mortgagor, that the mortgagor shall be tenant to the mortgagee, and it is equally undoubted that the law gives certain rights and priorities to a landlord, but the question is whether the contract between the parties was one under which (whatever were the words they used) they really intended to create the relation of landlord and tenant, or whether, under the mask of certain words, they

intended, without any real tenancy, to endeavour to give to the mortgagee all those rights which he could have only if he was landlord and the mortgagee was his tenant.

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BURTON
J.A.

* * * In considering the question we must look at both the amount of the rent, or what is called the rent, and the other circumstances, and if we find that the so called rent is so excessive that it never could have been meant to be paid by the occupier to the owner of the land for its use and occupation, that is very strong evidence indeed that there was no real intention to create a tenancy."

It may be difficult to believe that it was ever intended that the occupier of these premises or of a portion of them,—for the mortgagor was only in the occupation of a portion, and could not give a right to the mortgagees to distrain upon those portions which, at the time the mortgage was executed, were leased to tenants,—meant to pay in addition to the other large sums reserved as rent in each year, the sum of \$15,500 in 1888, for the use and occupation of those premises.

This at all events was a question of fact, and the learned Judge having found that there is nothing in the circumstances of this case to lead to the inference that it was not a *bond fide* contract to create the relationship of landlord and tenant, we cannot interfere with that finding.

I therefore, on the grounds which I have mentioned, concur in allowing the appeal.

OSLER J. A. :—

I think the appellants are entitled to succeed.

By their mortgage they acquired the legal estate in the premises from Darvill, who was then in actual occupation of part, and in possession of the remainder by his tenants. The mortgage was executed by the mortgagor only, but under the circumstances, the defendants cannot make anything out of that. The usual proviso that he should have quiet possession until default was omitted, probably by design, in consequence of an observation made in a

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OSLER
J.A.

former case, *Trust and Loan Co. v. Lawrason*, 6 A. R. 286, 10 S. C. R. 679, as to a similar proviso. It contains, however, what is described as a re-demise clause, framed with some care, by the first part of which the mortgagees purport to "lease to the mortgagor the said lands from the date of the mortgage, until the date therein provided for the last payment of any of the moneys thereby secured, undisturbed by the mortgagees or their assigns." It was strenuously contended on the argument of the appeal, and has been held by the Court below, that there is no attornment clause in the mortgage. With this I cannot agree. Following the language just quoted, and expressly referring to it, is a covenant by the mortgagor (*Cannock v. Jones*, 3 Ex. 233, at pp. 237, 238; Woodfall, Landlord and Tenant, 13th ed. pp. 159, 594), in these terms "he the said mortgagor paying therefor," that is, paying to the mortgagees for the premises so purported to be demised "in every year during the said term on each and every of the days in the above proviso for redemption appointed for payment of the moneys hereby secured, such rent or sum as equals in amount the amount payable on such days respectively, according to the said proviso, without any deduction." This, although the word "attorn" does not occur in it, is a very good attornment clause, for it is an agreement by the mortgagor that a tenancy shall exist between himself as tenant, and the mortgagees as landlords, upon the terms therein mentioned and referred to. It is evidence that the mortgagees have entered into an agreement for a tenancy, and it operated as a full and perfect attornment upon the delivery of the deed containing it to the mortgagees, and their acceptance of, and assent to it. A simple attornment, in days when the attornment of the tenant in possession was essential to perfect a grant of the reversion, was no more than the agreement of, or yielding consent by, the tenant to the grant, and thus acknowledging himself tenant to the new reversioner, and any words, written or spoken, importing such consent or

agreement, were sufficient for the purpose. Here the language of the mortgagor's contract in the re-demise clause comprises such consent, and the special terms of the tenancy besides.

Judgment.

OSLER
J.A.

In other parts of the same clause are further covenants by the mortgagor which shew very plainly that he has assumed the position of tenant at the rent specified. Then, as I have said, we have the mortgage deed containing these terms prepared by the mortgagees as the instrument by which the contract for the loan was to be evidenced and the loan secured, executed and delivered by the mortgagor to, and accepted by them, and the money advanced by them on its security, and on the terms thus proposed to their borrower.

It seems to me that so far as the language and acts of the parties can evidence it, a tenancy was created between them. To adopt the language of Kelly, C.B., in delivering the judgment of the Exchequer Chamber in *Morton v. Woods*, L. R. 4 Q. B. 293, at p. 307, "a tenancy was created between the parties much in the same way as if letters had been written by (Darvill) containing all the terms of this deed, including the contract to pay the rent, and the defendants had verbally expressed their assent to its terms. That would have been quite sufficient in law to create a tenancy at will between the parties at that rent and (Darvill) having occupied and omitted to pay the rent at the time stipulated the defendants became entitled to distrain," or as in the present case to insist upon payment of the rent under the statute before the removal of the goods by the sheriff. On the subject of the attornment and the certainty of the rent reserved I refer to what is said by Sir George Jessel, M.R., in *Ex parte Voisey*, 21 Ch. D. 442, at p. 452, and by Brett, L.J., at p. 457.

See also *West v. Fritche*, 3 Ex. 216, where it is laid down that the subsequent occupation by the mortgagor connected with the attornment clause, and the covenant to pay the rent, created the relation of landlord and tenant, although the mortgage had been executed by the mort-

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OSLER
J.A.

gagor only, and that the mortgagee was entitled to distrain for a half-yearly payment in arrear.

I am aware that in the cases I have cited, as well as in the case of *Re Threlfall*, 16 Ch. D. 274, it was held that the Statute of Frauds did not apply, and it was unnecessary to decide what would be the right of the mortgagee, where he had not executed the mortgage, and the attornment was for a term exceeding three years, which is the case before us.

A tenancy from year to year may be implied from the evidence upon the terms mentioned in the attornment, and that would be enough to support the plaintiffs' case. See *Gibboney v. Gibboney*, 36 U. C. R. 236, and cases there cited.

But it seems to me that where the mortgagor's right to retain possession is referable only to some agreement in respect of it, such as is made out in this case, the Statute of Frauds, in the present state of the law, creates no difficulty in the way of the mortgagees exercising the right to distrain. Under the circumstances it is manifest that they would not have been permitted to eject Darvill, or to say that he was not entitled to possession under terms of the instrument prepared and accepted by them, but on the contrary that he would have been entitled to insist that he was their tenant on the terms mentioned in the instrument. I quote a passage of the judgment of Lord Esher in *Swain v. Ayres*, 21 Q. B. D. 289 at p. 293: "The distinction between law and equity is now abolished in the sense that the same Court is to give effect to both, and that, when the doctrines of law and equity conflict the latter are to prevail. I should therefore be disposed to say that, when there is such a state of things that a Court of Equity would compel specific performance of an agreement for a lease by the execution of a lease, both in the Equity and Common Law Divisions of the Court, the case ought to be treated as if such a lease had been granted, and was actually in existence." Field, J., in *Re Maughan, Ex parte Monkhouse*, 14 Q. B. D. 956, says "Since the Judicature Acts, there is now no dis-

inction that I can see between a lease and an agreement for a lease, because equity looks upon that as done which ought to be done." The statement of the law by the late Master of the Rolls in *Walsh v. Lonsdale*, 21 Ch. D. 9, at p. 14, has met with general acceptation. "There is" he says "only one Court and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted. On the other hand, he is protected in the same way as if a lease had been granted." I think this passage expresses the position and the rights and liability of the mortgagor and mortgagees in this case, and that the latter would therefore be entitled to distrain, or to give notice to the sheriff under the statute. See also *Furness v. Bond*, 4 Times L. R. 457; *Allhusen v. Brooking*, 26 Ch. D. 559; *Lowther v. Heaver*, 60 L. T. 310, at p. 313.

Judgment.

OSLER,
J.A.

I see no reason to doubt that the parties really intended, for the purpose of bettering their security, to create the relation of landlord and tenant at a real rent. The payments are not excessive or out of proportion to the amount which might be expected to be realized by distress, until we come to the final payment, consisting of the principal sum. That is not an arbitrary amount fixed, as we find in some of the cases, without regard to the amount really due, or the probability of being able to levy a distress for the whole of it, but is the principal money becoming due in accordance with the contract of the parties, and might, in my opinion, be made the subject of recovery by distress, so far as a distress might be found available, without giving rise to the inference that the intention of the parties was not that which their contract expresses.

For these reasons I think the appeal should be allowed. I do not wish to be understood as dissenting from the

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OSLER
J.A.

view which I have just heard expressed by Mr. Justice BURTON, but I have not considered whether the instrument may be capable of the construction he places upon it.

MACLENNAN J.A. :—

The only question in this case is, whether the relation of landlord and tenant existed between the plaintiffs and David Darvill, so as entitle the plaintiffs to distrain upon his goods.

Darvill executed a deed containing a covenant to pay rent for the mortgaged premises equal in amount to the instalments of the mortgage money, and at the times fixed for their payment respectively. Upon this deed being executed it was delivered to the mortgagees, and they advanced their money. The mortgagor remained in possession, and continued in possession until the claim made for the rent out of which this action arose.

I am of opinion that upon this deed, Darvill became and continued to be a tenant to the plaintiffs, and that he could not set up the Statute of Frauds, *Ex parte Voisey*, 21 Ch. D. 442, at p. 456.

It is, I think, too clear for argument now, both upon principle and authority, that if a man in occupation of my land, executes a deed poll declaring that he is my tenant, say for ten years at a certain rent, I may distrain for the rent though I have signed nothing. If a mortgagee can sue upon the covenant for payment of the mortgage money without executing the mortgage, I do not see why he cannot distrain upon an attornment of the tenant by deed, though he may have signed no demise. *Ex parte Punnett*, 16 Ch. D. 226, shews that all that is necessary is the relation of landlord and tenant, and that may be by estoppel without legal reversion. In that case it was held that the mortgagor might be tenant to two mortgagees, of the same land, at the same time, and liable to distress by both. See also *In re Stockton Iron Furnace Co.*, 10 Ch. D. 335, and *Jolly v. Arbuthnot*, 4 De G. & J. 224.

The right to distrain can also, in my judgment, be upheld on another ground.

Judgment.
MACLENNAN
J. A.

The possession of the mortgagor after the execution of this mortgage deed cannot be attributed to anything but the agreement between him and the mortgagees, which was come to between them, and which was intended to be completed by being executed by both parties. That possession and the other circumstances gave Darvill the right to enforce the agreement by the execution of the mortgage by the mortgagees.

In equity, therefore, the relation of landlord and tenant arose between the parties, and existed between them when the goods were seized, and the authorities shew that that is sufficient to entitle the landlord to distrain.

Walsh v. Lonsdale, 21 Ch. D. 9, is an authority on this very point, and it was afterwards cited with approval and followed in *Allhusen v. Brooking*, 26 Ch. D. 559, and in *Furness v. Bond*, 4 Times L. R. 457.

I am of opinion therefore, with great respect, that the judgment of the Queen's Bench Division should be reversed, and that the judgment of Mr. Justice Rose should be restored.

Appeal allowed with costs.

FERGUSON V. KENNY.

Voluntary conveyance—Right of creditor to whom grantor has been continuously indebted on current account to attack—Object of settlement.

The defendant made a voluntary conveyance to his wife of certain real estate owned by him. Without this real estate, his liabilities, among which was a debt to the plaintiffs of about \$1,500, exceeded his assets. He continued to deal largely with the plaintiffs down to the time of his failure some years afterwards, the balance then due them being about \$2,300, but much more than \$1,500 had been in the meantime paid to them.

Held, that the conveyance was fraudulent and void as against creditors. *Per* HAGARTY, C. J. O., and OSLER, J. A. In the case of a continuous dealing and account where the customer goes on paying with one hand on general account and purchasing fresh goods with the other hand to an equal or larger amount, with a constantly increasing balance against him, the creditor is from the commencement of such dealing, so long as his ultimate balance remains unpaid, in a position to attack an alleged voluntary conveyance.

Per MACLENNAN, J. A. The settlement having been made with the object of putting the property beyond the chances and uncertainties of the business in which the settlor was engaged and which he continued to carry on until insolvent, must be regarded as having been made with intent to defraud the creditors of that business, and it was unnecessary to prove any old debt still unpaid.

Decision of BOYD, C. affirmed.

Statement.

THIS was an appeal from the order of BOYD, C., dismissing with costs an appeal by the defendant Margaret Kenny from the report of Mr. Winchester, Official Referee, who held that the conveyance in question in the action, from J. H. Kenny, to his wife Margaret Kenny, was fraudulent and void as against the creditors of the grantor.

Before the month of September, 1880, the defendant J. H. Kenny had been a commercial traveller for several firms carrying on business in Toronto, and was the owner, free from encumbrances, of a parcel of land and a dwelling house in that city, of the value of about \$4,000. He had been married in the year 1875, to his co-defendant, and they lived in this house. He had no other property or means besides this house, and in September, 1880, he commenced to carry on, in a store on Queen street, a millinery and fancy goods business. He obtained his first stock of goods, or the greater part of them, from the firm of Patterson Bros., one of the firms in whose employ he had been as

a traveller, and also from the firm of W. J. McMaster & Bros. Patterson Bros. apparently did not require any security, but Kenny gave W. J. McMaster & Bros. a mortgage upon the dwelling house to secure his account. Patterson Bros. failed about the end of 1882, and Kenny then owed them \$4,200 in the form of maturing notes, under discount in the Bank of Montreal, and it became necessary for him to make some arrangement to meet the notes as they became due. On the 26th of December of that year he paid a small balance then due to W. J. McMaster & Bros., and obtained a discharge of the mortgage held by them. He then went to the manager of the Bank of Montreal, explained his position to him, and spoke to him about the maturing notes held by the bank, with the result, as he said, that he was advised that if he could raise \$2,000 and put it into his business he could "float along nicely," the manager being willing, if that sum were paid then, to give time for payment of the balance. Kenny also stated that just at this time he was advised by a friend living near him to convey the property to his wife, and he then took measures to have the property transferred, and to obtain a loan on the security of it. An application for the required advance was made to a loan company, but it was found that the transaction could not be completed in time to meet the accruing payments, and he finally arranged to obtain the advance from McCall & Co., with whom he had dealings. He made a mortgage in favour of William Blackley, one of the partners in that firm, as trustee for that firm, reciting that he owed them \$2,000, or thereabouts, for advances, and had agreed to make the mortgage as collateral security for all present or future indebtedness on account of purchases or cash advances, with the proviso that the mortgage was to be void on payment of all money due, or thereafter to become due, for purchases, cash advances, interest, or otherwise. The \$2,000 mentioned in the mortgage was advanced by McCall & Co., and the Patterson notes were in time paid off. Nothing further was done at this time in connection with the proposed transfer of the

Statement.

Statement.

property to the wife. Between the date of the making of the mortgage and the 1st of September, 1884, Kenny obtained more advances and goods from McCall & Co., so that at the last mentioned date the amount due on the mortgage was about \$4,000. He had gradually been falling behind in his business, and in September, 1884, had merely a small nominal surplus in it of about \$639, and he then made a voluntary conveyance, to a trustee for his wife, of the dwelling house, the conveyance being expressed to be subject to the mortgage to McCall & Co., but there was a covenant by Kenny to pay off that mortgage.

At this time Tait, Burch & Co., were creditors of Kenny for about \$1,500. Kenny continued to deal with them from that time until his failure, making payments from time to time, and getting goods from time to time, his indebtedness to them steadily increasing until at the time of his failure it amounted to over \$2,300, though after the making of the conveyance and before the failure, he had paid to them much more than the \$1,500 due to them at the time the conveyance was executed. On the 26th of April, 1887, Kenny made an assignment for the benefit of his creditors to the plaintiff Ferguson, who brought this action to set aside the conveyance from Kenny to his wife.

Subsequently Tait, Burch & Co., who had obtained a judgment against Kenny for the amount of their claim against him, were added as plaintiffs (see 12 P. R. 455), and the questions in the action were referred to Mr. Winchester, Official Referee, to inquire and report thereon, and he found against the validity of the conveyance, this finding being affirmed by BOYD, C.

The appeal of the defendant, Margaret Kenny, from the order of BOYD, C., came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSIER, and MACLENNAN, JJ.A.) on the 7th of March, 1889.

Moss, Q. C., and A. C. Galt, for the appellant. The referee was wrong in his finding that the grantor was insolvent at the date of this conveyance. The indebtedness

secured on the property in question should be deducted from his liabilities, and the value of the equity of redemption in the property conveyed, should be added to his assets: *Re Lowndes*, 18 Q. B. D. 677. It is clear that the assignee has no right to bring this action, as the transaction in question took place before the Act came into force: *Coats v. Kelly*, 15 A. R. 81; *Clarkson v. Sterling*, 15 A. R. 234. The assignee having no right to sue, the action cannot be maintained by the addition of the execution creditors: *Walcott v. Lyons*, 29 Ch. D. 584; *McClenaghan v. Grey*, 4 O. R. 329. Even if the execution creditors were properly joined as plaintiffs, still they themselves have no right to sue as there is no debt now in existence that was in existence at the time the conveyance in question was made: *Struthers v. Glennie*, 14 O. R. 726. The indebtedness existing at the time of the conveyance has been paid, and there was at the time no intent to delay or defeat creditors, and there is no inference of the intent from the effect: *Allan v. McTavish*, 8 A. R. 440; *Ex parte Mercer*, 17 Q. B. D. 290. The principle of *Cameron v. Kerr*, 3 A. R. 30, and *Moffatt v. Merchants Bank*, 11 S. C. R. 46, does not apply: these were cases of a continuing guarantee. The creditors who are complaining had notice of the conveyance, and cannot now set it aside: May on Fraudulent Dispositions of Property, 2nd ed., pp. 183, 184.

Geo. Kerr, Jr., and Duggan, for the respondents. The defendant was in insolvent circumstances at the time the conveyance was made, if the amount that could be realised out of his business is considered: but even if he were solvent, still he was at least indebted to some extent, and mere indebtedness is sufficient if it continues, as this is a case of voluntary conveyance. Here the indebtedness was continuous, as there was always a balance due by the defendant to the plaintiffs, and wiping out the earlier items of the account does not wipe out the debt. The fact that the defendant covenants to pay the indebtedness secured by the mortgage makes it impossible to leave out that indebtedness in arriving at the amount of the liabilities.

Argument.

Argument. The order adding the execution creditors as parties plaintiffs cannot now be complained of.

Moss in reply.

April 30th, 1889. HAGARTY C. J. O.:—

The learned Chancellor upheld the findings of the official referee on the motion against his report. That the conveyance must be regarded as a wholly voluntary gift or settlement on the wife, cannot, I think, be questioned.

The referee finds on this point:

“With reference to the conveyance from himself to his wife: The defendant swears that there was no agreement whatever between them as to it, nor was there any consideration paid therefor, and that his wife knew nothing about it until he handed her the receipt for the solicitor’s charges for drawing and registering it. It does, however, appear that he and his wife had on two or three occasions conversations about making the place over to her. The first conversation being at the time he executed the mortgage of the property to W. J. McMaster & Co. It is argued on behalf of Mrs. Kenny, that she paid a valuable consideration for the premises; the evidence in support of this contention being that she is entitled to something for assisting her husband in the store, and for a sum of money which she paid out in supporting the family before he commenced business, and whilst he was out of work; but this sum so expended was, however, saved by her out of money paid by him for the support of the family previous to his being out of employment. Both of the defendants admit that there was no agreement between them whatever that he should obtain the premises for these or any other considerations.”

I have examined the evidence, and I think that the conclusions above quoted, are correct, and that the deed is purely voluntary. We have therefore to consider his financial position at the time.

The learned referee has examined the books of the defendant from his starting in business in 1881, to his failure.

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• C.J.O.

In August, 1884, just before the impeached deed, his books shew a small balance in his favour of \$639.54, next year \$163, and the last year \$121.53.

A large portion of his stock-in-trade consisted of millinery goods, depreciating very seriously if unsold and remaining over to the next season; and he comes to the conclusion, "I have no doubt in my mind that the defendant from the beginning of his business to the date of his assignment was not at any time in a position to pay off his indebtedness out of his stock and book debts."

This stock was sold by the assignee, and produced 52 cents on the dollar. The witnesses said they considered this a good sale.

I am obliged to agree with the referee on this point, and think that the defendant was, when he made this conveyance, not in a position to discharge his existing liabilities, that in fact his debts exceeded his available assets.

It is said that the property on D'Arcy street should be counted as part of his assets. Taking it at the best if it would make him solvent, and without it he would not be solvent, its withdrawal without value from his assets must seem to be the kind of proceeding aimed at by the statute.

It will not help the defendant's position if the value of the real estate be added to the total of his assets. By the terms of the impeached deed he declares it to be subject to the McCall mortgage (to Blackley) then amounting to some \$4,000, and he covenants and agrees to pay off and discharge this when due. Thus he takes upon himself that payment, so that the whole property would go for the benefit of the wife free from encumbrance.

It was attempted to be shewn that this covenant was not intended to be given by the defendant Kenny, and an affidavit disclaiming interest thereunder was fyled by the wife. We cannot, of course, listen to any such suggestion.

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C.J.O.

The property stands in her trustee's name, as in the deed, and for the purpose of this suit the deed must speak for itself.

The law on this point is very fully stated in *Ex parte Huxtable*, 2 Ch. D. 54; 34 L. T. N. S. 605; May, 2nd ed., p. 58. James, L. J., says: "At the time when the settlement was made the debtor owed debts which, together with the mortgage debt, exceeded the amount of his assets other than the mortgaged property. He made a settlement, which for this purpose must be taken to have been not a settlement of the equity of redemption, but of the whole estate; for he covenanted with the trustees to pay off the mortgage debt out of his other assets. If he had paid the debt according to this covenant, enough would not have been left to pay his other creditors. Whether the deed is bad under 13 Eliz., ch. 5, or not, it is bad under section 91 of the Bankruptcy Act."

Mellish, L. J.: "Generally, you cannot consider a man to be settling more than he has got, and generally, you exclude a fully secured debt from his debts. But here the deed recites an intention to settle the whole property, and the settlor covenants to pay the interest on the mortgage debt, and on demand to pay off the principal. If, therefore, the trustees had demanded payment, it must have been made out of his other assets, leaving them insufficient for payment of his other debts."

I think this case exactly meets the argument on this point addressed to us by Mr. Moss. I think the settlement here must be held to be bad under 13 Eliz., just as the settlement in question in that case, was held by the County Court Judge in England to be bad under the bankruptcy section.

The referee says that both defendants swore they had no intention of defrauding the creditors, and he was of opinion that "they are honest in this statement, but the result of the conveyance has had that effect."

The defendant, in his evidence, disclaimed all idea of intending to defeat or delay his creditors. He had had deal-

ings with McCall & Co., and had given a mortgage on this property to one Blackley, a member or officer of that firm. The mortgage was for the then amount of his debt to them, and was to be a continuing security for future advances. The amount secured ran up ultimately to about \$4,000. He states that he always thought it was only a mortgage for \$2,000, and that was the only encumbrance on the property. He says that Blackley suggested to him to transfer the property to his wife.

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C.J.O.

To understand the effect of some of his evidence, it is necessary to notice the very unpleasant fact that the professional gentleman conducting the case against him is frequently referred to by him as the lawyer who drew this deed, and with whom he advised :

Q. How was the giving of that deed to your wife brought about? A. I went down to Mr. Blackley and told him I thought of transferring the house to my wife. He had many times previously asked me to transfer the house to my wife. I went down and saw Mr. McCall and Mr. Blackley; they were talking; I called Mr. Blackley to one side and said to him, I think I will take your advice and transfer my house to my wife. He said he was very glad—to go over and see what Mr. McCall would say. Blackley mentioned to Mr. McCall that I wanted to transfer the house to my wife. Mr. McCall answered, how are we to be paid, and Mr. Blackley gave Mr. McCall to understand that if I bought any more goods from them my wife would have to sign the notes. Mr. McCall said all right, and Mr. Blackley, on going down stairs with me, tapped me on the shoulder, and said I am glad you are going to do it; let us go over to Kerr's at once. I went over to Kerr & Bull's; I did not see Mr. Kerr, I think it was Mr. Bull. I think it was Mr. Bull Mr. Blackley gave instructions to, and Mr. Bull told me when to come down to the office to sign the deed. That is all that occurred.

He then says: "I always intended the house for my wife. You told me I could do as I pleased." That his wife never in fact signed any notes. He never told her about

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the transfer till he gave her the receipt for the expenses thereof. He admits, in answers to questions, that his business was gradually weakening, and that if his creditors had insisted on immediate payment of his notes, it would have resulted in his stoppage.

It is best to extract the answers and questions, as on this the case is peculiar:

Q. And you pretend that you were not taking that property and putting it in your wife's name for the purpose of getting it out of the creditors' reach? A. I done it with your instructions from you that I could do it, and you were my lawyer; I expected honour and truth from you.

Q. You intended that that property should go out of your hands so that the creditors should not reach it? A. I did not; I intended that that property should be my wife's, with that mortgage. I thought there was a mortgage of \$2,000, and Mr. Blackley always told me, says he, "Kenny, get your account worked down to \$2,000."

Q. And you thought it advisable to get that property into your wife's hands for what purpose? A. Well, I wanted my wife to have the property outside of \$2,000.

Q. And outside of all other creditors? A. No. Q. Did you intend that she should be a trustee for that property for the creditors?

A. I left all instructions to you; I was getting advice from you. My intention was that my wife always was to have that house, and it was because of the endorsing difficulty that this difficulty has arisen on me now.

Q. You gave that property to your wife, and at the time you intended that the creditors should not have any further claim on it?

A. Well, they would not have any further claim on it, according to your instructions to me.

Q. You intended that? A. No, my intention was not of that fraudulent nature that you are trying to make me believe.

Q. Did you, or did you not? A. I did not.

Q. You did not intend that that property should be in your wife's name, and that she should have absolute control of it? A. Oh, yes, I intended that; I thought you meant in reference to defrauding my creditors.

Q. I want to know what you

intended when you made that transfer of that property to your wife? A. I intended my wife to have the house. Judgment.

Q. And you intended that the creditors, therefore, with the exception of that mortgage in favour of McCall & Co., should have no further claim upon it? A. Certainly. HAGARTY
C.J.O.

We are not often called upon to read or form an opinion of evidence given under such unpleasant circumstances. If the defendant be an honest man, not intending to commit a fraud, but from advice given to him, or from ignorance of the law, make a wholly voluntary gift of his property in the position in which he then was, he must of course take the consequences, and his ignorance, or the trust reposed in another for his guidance cannot validate an act forbidden by statute law.

An examination of a large number of the authorities, many of them very familiar to us all, leads me to the conclusion that this conveyance cannot be supported. I am satisfied that when it was made the defendant was not in a position to satisfy his existing creditors if required so to do.

It was strongly argued before us that the plaintiff Burch and his firm could not be heard impeaching the deed as the debt owing to them at the time of its execution had been paid off before the action was brought.

When the deed was executed on the 1st September, 1884, Kenny owed them somewhere from \$1,000 to \$1,600. He was then dealing largely with them, and continued so dealing for a long time, making payments and buying fresh goods. The balance against him seems to have gone on increasing till at the time of his assignment it stood at \$2,392. But the payments made by him from time to time exceeded in amount the sum due them at the date of the impeached deed. His counsel contended that therefore all his debt due to them at that date had been subsequently discharged.

I am satisfied that we should not accede to this argument.

In the case of a continuing dealing and account, I cannot believe that a system under which the customer goes on paying with one hand on general account, and purchasing

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fresh goods with the other hand to an equal or larger amount, with the result that several years dealings shew a constantly increasing balance against him, entitles him to say that his creditor was not from the commencement of such a dealing, so long as his ultimate balance remained unpaid, in a position to take advantage of the statute in a case like the present.

The question is discussed in May, 2nd ed., p. 61. The writer states that it is clear that where a man in embarrassed circumstances makes a voluntary conveyance, and then makes an arrangement by which the existing creditors are paid off and new creditors substituted, the conveyance would be void against the subsequent creditors. * * * "Thus where the voluntary settlor was, at the time of the settlement, indebted to the plaintiff on the balance of a mining account, and afterwards paid on account large sums, exceeding the debt due prior to the deed, but the balance against him kept increasing till his death, the settlement was set aside."

Whittington v. Jennings, 6 Sim. 493. There the Vice Chancellor (Sir L. Shadwell) said: "The creditor always dealt with the same person, and though some money was, from time to time, paid in respect of the old debt, that debt went on continually increasing." In that case it is clear from the facts that the subsequent payments greatly exceeded the amount due at the date of the voluntary conveyance which was set aside.

Richardson v. Smallwood, Jacob 552, was cited by Sir E. Sugden for the plaintiff.

Sir Thomas Plumer, M. R., there says: "Being indebted is only one circumstance from which evidence of the intention may be drawn. But suppose a person indebted to execute a conveyance, such that if those who were creditors at the time complained, it would be void as against them: then if they are paid off and a new set of creditors stand in their places, does that make any difference? Does it not hinder and delay these creditors, and is it not void against them?"

In *Holmes v. Penney*, 3 K. & J. 90, at pp. 99, 100, Sir W. P. Wood, V.C., comments on *Richardson v. Smallwood*, and quotes the Master of the Rolls' illustration, and adds: "Such a settlement would be void against the subsequent creditors, because it would be a fraud upon the statute. The statute is for the protection of creditors 'or others,' not creditors only, and if such a case were presented to the Court, it would probably hold the whole proceeding to be a contrivance, and would consequently set aside the settlement."

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Bump on Fraudulent Conveyances, 3rd ed., 322, discusses the subject of "continuous indebtedness." He says: "The mere fact, however, that the prior debts have been paid off, will not alone render the transaction valid, though it is entitled to great weight. A great deal will depend upon the mode in which such debts are paid. Paying off one debt by contracting another is not getting out of debt, Proving, therefore, that the prior debts have been paid off is doing nothing if in so doing the donor has contracted others to an equal amount, and is not sufficient. * * * Such a continuous indebtedness has been justly compared to a stone descending a mountain covered with snow. Its bulk is increased every time it rolls over, but still every added particle is referable to the stone originally put in motion, as the cause of its adhesion to the aggregate mass." and cites *Brown v. McDonald*, 1 Hill Ch. 297.

These later cases point more to the substitution of one creditor for another, and only the case before Vice-Chancellor Shadwell is directly applicable to the facts of the present case.

As already intimated, I have no doubt that for the purposes of this suit, Tait, Burch & Co. must be considered as entitled to be called creditors at the time of the voluntary deed.

They were his creditors before, and then, and never ceased to occupy that position down to the time of his failure.

I think the appeal must be dismissed, but under the

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circumstances, without costs, and the action, as regards the assignee, dismissed with costs.

On the general law as to secured debts in such a case, see *Stephens v. Olive*, 2 Bro. C. C. 91; *Jenkyn v. Vaughan*, 3 Drew. 419; *Ware v. Gardner*, L. R. 7 Eq. 317.

OSLER J. A. :—

I think the plaintiffs Tait, Burch & Co., are in a position to maintain this action, as they were creditors of the defendant when the impeached conveyance was made, and have been so up to the present time. Their debt was never completely paid off. It was merely running on—continued from thence hitherto. The rule as to the appropriation of payments cannot be applied so as to defeat an action like this by shewing that in the course of subsequent dealing between the parties, the creditor has been paid a sum sufficient to wipe out the debt as it originally stood.

The plaintiffs never ceased to be creditors, and therefore never lost the right to attack the transaction.

The only other point in the case is whether the debtor was, in August, 1884, in a position to make a voluntary assignment of the lot in question. Whatever conclusion I might have felt at liberty to arrive at on this point, had there been nothing but a conveyance of the equity of redemption, I am compelled to hold that the debtor, by covenanting with the wife's trustee to discharge the mortgage debt, thereby constituted him a creditor in respect thereof, and has in effect made a settlement of his whole estate in the land. It is impossible to say that he was then in a position to make such a settlement, for if the mortgage debt, in addition to the other debts, was to be paid out of his other assets, it is clear that they were insufficient for that purpose. See *Ex parte Huxtable*, 2 Ch. D. 54.

So far as Ferguson, the assignee, is concerned, the action must be dismissed, and the appeal to that extent be allowed with any costs which the defendants may have incurred by reason of his having been made a party. Looking

at the date of the deed and the date of the assignment, it is manifest that the transaction is one which could not have been attacked by an assignee.

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OSLER
J.A.

The creditors are entitled to avoid it under the Statute of Elizabeth, and therefore as to them the appeal must be dismissed, but they are not entitled to tax more costs in the action than if they had been made parties plaintiffs in the first instance.

Looking at the peculiar circumstances under which the action was brought, I agree to dismiss the appeal without costs.

MACLENNAN J. A. :—

The question in this appeal is, whether in the state of his affairs on the 1st of September, 1884, Kenny could lawfully make this settlement on his wife, and whether it could be otherwise than void against his creditors.

It seems to me hardly to admit of any serious argument that the settlement was void, and that the judgment so declaring it must be affirmed.

Consider the situation of the settlor at the date of the deed. He had begun without capital, and almost from the beginning he had to make use of this property to obtain and to keep up his credit. In January, 1883, it is difficult to see how he could have gone on if he had not had it and raised money upon it.

It is not too much to say that at the time of the settlement, this property was the only element of stability there was in his affairs. Four-fifths of his credit rested on it and depended upon it. He had just had the second unfavourable stock taking. He had not only made no profit during the year just past, but a loss of nearly \$400. All that he could call his own, was the business surplus of \$639, and the house property \$4000.

The value that could be attached to this apparent surplus of \$639, will be apparent from a reference to Mr. Kenny's own evidence. He had stock in trade \$5,591, shop furni-

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ture, \$135, book debts, \$219 ; total assets, (without including the dwelling-house) \$5,945, and his liabilities were \$5,306, leaving an apparent surplus of \$639. This is an extract from his evidence :

“ Q. You dealt principally in millinery ? A. I also had fancy goods and dry goods. Q. Your stock of dry goods was apparently small ? Your loss was principally on the millinery and fancy goods ? A. Yes, and I had to meet a great many renewals, and these counted up a great deal quicker than I thought they could. Q. I suppose almost from the start you had to commence paying interest ? A. Yes. Q. So that you had interest and bad trade, and had to sell goods under cost ? A. Yes. Q. Did you lose any bad debts ? A. Very few. Q. A case of depreciation in value ? A. Yes. Q. Is millinery a stock that depreciates rapidly ? A. Yes. Q. Goods that the ladies run after one season they won't touch the next ? A. No. Q. So that if you carry over any stock it depreciates ? A. Yes. Q. A stock like this if put on the market at a forced sale, would necessarily be sold at a very small percentage on the dollar ? A. Yes, people do not like to handle any stock with millinery in it. Q. When you go to sell a stock like yours, you must sell it at a low rate on the dollar ? A. Yes. Q. As a matter of fact what was your stock sold at ? A. At 52 cents on the dollar. Q. You went 51 cents ? A. Yes. Q. Had you talked this matter over with Mr. Holmes before ? A. Probably I spoke to Mr. Blackley. Q. You agreed that you would not go beyond 50 cents on the dollar ? A. Well, I had very little to say in the matter, but they gave me to understand that 50 cents on the dollar was as much as they would go. Q. Mr. David Miller went one cent more ? A. I do not know who it was. Q. At any period of your business career I suppose it would have been about the same thing if your stock had been forced on the market ? A. It might have gone a little higher the first two years, but the probabilities are it would have been about that rate.”

It is evident from this evidence that in Kenny's own

judgment he was, when he made the settlement in Sep- Judgment.
tember, 1884, insolvent, apart from his ownership of the MACLENNAN
dwelling house. If we suppose his shop, furniture, and J.A.
book debts worth par, a loss of even twelve per cent. in
realizing his stock-in-trade, would turn his surplus into a
deficiency, but according to his own testimony a loss of
from forty to forty-eight per cent. is what would most
probably have happened.

In my judgment then the case is that of a person engaged
in trade which he is carrying on altogether on credit, and
without capital, which he knows has begun to fail, and to
be a losing concern, making a gift of the only substantial
asset he possessed, making away with the only factor of
substance or stability there was in his possession, the
effect of the gift being that the property he had left was
not sufficient to pay his debts.

I think there can be no question that such a transaction
is void. It may be he had hopes of struggling through and
paying everybody, and that he meant to do his best to do
so, and that in that sense he did not intend to defraud his
creditors. But I think he contemplated the possibility,
nay the probability of failure, and that he made the deed
in question to put the dwelling house beyond the chances
and uncertainties of the business he was carrying on.

It is very significant that it was during the anxious time
occasioned by the failure of his largest creditors, Patterson
Bros., that he first thought about making this settlement,
and actually gave instructions to have it done, and also
that it is carried out after he discovered that his business
was a losing instead of a gaining concern.

I think it is not proved that Tait, Burch & Co., who
were creditors at the date of the settlement for over \$1.000;
had any notice or knowledge of the intention to make, or
of the actual making of it, and I am clear that they could
then have impeached it successfully. Kenny dealt with
them from that time till his failure, making payments and
getting new goods, and his debt to them so far from grow-
ing less, steadily increased until it had become at the time

Judgment. of the failure, \$2,300. It is admitted, however, that after
MACLENNAN the making of the deed, and before his failure, the pay-
J.A. ments he made were sufficient to satisfy the whole of the
debt which existed at the time of the settlement, and there
is, strictly speaking, no debt now unpaid which existed on
the 1st of September, 1884.

It has been contended before us that in the absence of
such a debt, the plaintiffs cannot successfully impeach the
settlement, being merely subsequent creditors.

I am, however, of opinion that this settlement having
been made with the object of putting his dwelling-house
beyond the chances and uncertainties of the business in
which he was then engaged, and which he continued to
carry on until he became insolvent, it must be regarded
as having been made with intent to defraud the creditors
connected with that business; and that it is unnecessary
to prove any old debt still unpaid.

The rule deducible from the oldest as well as the
latest authorities seems to be that stated in May, 2nd
ed., p. 63, as follows: "If such settlement was made by
a person at that time really insolvent; that is to say,
not in a position to make any settlement whatever, that
settlement may be impeached by a creditor, though sub-
sequent—though no debt is proved to exist which was
contracted at the date of the settlement." Citing *Crossley*
v. Elworthy, L. R. 12 Eq. 158, and *Taylor v. Coenen*, 1 Ch.
D. 636.

The rule is also stated by Lord Westbury, in *Spirett v.*
Willows, 3 D. J. & S. 293, at p. 302, as follows: "But if
a voluntary settlement or deed of gift be impeached by sub-
sequent creditors whose debts had not been contracted at
the date of the settlement, then it is necessary to shew
either that the settlor made the settlement with express
intent to 'delay, hinder, or defraud creditors,' or that after
the settlement the settlor had no sufficient means or rea-
sonable expectation of being able to pay his then existing
debts; that is to say, was reduced to a state of insol-
vency; in which case the law infers that the settlement

was made with intent to delay, hinder, or defraud creditors, and is therefore fraudulent and void."

Judgment.
MACLENNAN
J.A.

In *Campbell v. Chapman*, 26 Gr. 240, at p. 242, the late Chief Justice Spragge said: "I take the rule to be that where a voluntary settlement is made with a view to the uncertainties of business, by a person about to engage in business, the settlement will be very closely enquired into; and where it embraces the whole of the settlor's property, it will be difficult to resist the conviction that it was made in order to hinder and defeat creditors in the event of business proving unsuccessful, so far as the withdrawal of the settled property would have that effect."

In *Mackay v. Douglas*, L. R. 14 Eq. 106, at p. 122, Sir R. Malins said: "The conclusion which I arrive at proceeds upon the broad ground that a man who contemplates going into trade cannot on the eve of doing so take the bulk of his property out of the reach of those who may become his creditors in his trading operations." And in *Ex parte Russell*, 19 Ch. D. 588, the Court of Appeal approved of *Mackay v. Douglas*, and stated (p. 598) the principle to be that a man is not entitled to go into a hazardous business, and immediately before doing so, to settle all his property voluntarily. At p. 601, Lindley, L. J., says: "The settlement was executed by a baker, who had been a thriving and prosperous man. He had saved money. He could pay all his debts. Substantially, he had plenty of assets, but he was going to take a grocer's shop. He knew nothing of a grocer's business. He was perfectly aware that entering upon a business to which he had not been brought up was a risky thing, and, therefore, he made a settlement, settling substantially the whole of his property upon his wife and children. * * It appears to me that this is plainly within the principle of *Mackay v. Douglas*, one of the most valuable decisions that we have on the Statute of Elizabeth."

Now, if a man about to engage in trade, may not settle the bulk of his property before doing so, much less in my judgment, may he do so after he has actually gone into

Judgment. business and found it was not going to be successful.
MACLENNAN According to the authorities referred to, if Kenny had
J.A. made this settlement just before he commenced his business, it clearly could not stand as against liabilities afterwards incurred; and it follows that a subsequent settlement of the same property must be equally invalid.

I am, therefore, of opinion that the appeal must be dismissed.

BURTON J. A. —

I agree in the result, but I must not be understood as assenting to the view that a creditor, whose claim at the date of the impeached instrument has been paid off, occupies any other position than that of a subsequent creditor, although the debtor has continuously dealt with him and incurred new liabilities to an equal or larger extent than the original debt.

Appeal dismissed without costs.

BLACKLEY V. McCABE.

Bills of Exchange and Promissory notes—Cheque—Presentment—Waiver of presentment and notice of dishonour—Accord and satisfaction.

On the 26th of June, P. and M. exchanged cheques for the accommodation of P., the cheque of P. being drawn on a bank in Hamilton, and the cheque of M. being drawn on private bankers in Toronto. It was agreed that the former cheque should not be presented before the 1st of July and it was alleged by P. but denied by M. that a similar restriction applied to the latter cheque. The private bankers suspended payment and closed their doors about noon on the 27th of June, having a large balance in their hands at the credit of M., who, on that day, served a writ on them in an action to recover this balance, (the amount of the cheque being included). His cheque was never presented for payment nor was any notice of dishonour given. The cheque of P. was presented and paid.

Held, that even assuming there was no agreement to postpone presentment, P. had the whole of the 27th of June to present M.'s cheque, and therefore had not been guilty of laches up to the time of the suspension of the bankers; that although the suspension would not in itself excuse non-presentment and want of notice of dishonour before action, yet this event and the bringing of the action by M., which operated as a countermand of payment, would do so.

Per OSLER, J.A. The defendant, having by his pleading and throughout the case rested his defence solely on the non-presentment of the cheque before the suspension of the bankers, must at this stage of the cause be treated as having waived presentment and notice of dishonour after that time, the evidence showing that he had no reason to expect that his cheque would then be honoured and that he could have sustained no loss in consequence of such non-presentment.

Some time after the suspension of the private bankers, and after some negotiations between P. and M. as to the payment of M.'s cheque, P. signed a memorandum drawn up by M. in the following form: "please take judgment when you think best against F. and L. (the private bankers), to include the amount of your cheque for \$575 to me, upon the understanding that the same is to be paid me out of the first proceeds of such judgment. You are to exercise your best discretion in the matter."

M. then went on with his action and entered judgment but nothing was recovered.

Held, that this memorandum did not necessarily import an abandonment of P.'s claim upon the cheque and the acceptance of a new and substituted mode of obtaining payment and did not operate as an accord and satisfaction.

Decision of the Queen's Bench Division affirmed.

THIS was an appeal from the judgment of the Queen's Bench Division. Statement.

On the 26th June, 1884, one R. H. Park, who was at that time, under the firm name of John Garrett & Co., carrying on business in the city of Hamilton, exchanged cheques for the sum of \$575, with the defendant, who resided at the

Statement. city of Toronto. The exchange was made for the accommodation of Park, who had overdrawn his account in the firm's books, and wished to have it balanced at the end of the month when the accounts were to be audited by the trustees of the Garrett estate, who were entitled to a certain proportion of the proceeds of the business. The cheque given by Park to the defendant was drawn in the firm name upon the Canadian Bank of Commerce at Hamilton, and the cheque given by the defendant to Park, was drawn upon Forbes & Lownsbrough, private bankers in Toronto. It was agreed when the exchange was made that Park's cheque was not to be presented for payment until after the 1st of July, and it was alleged by Park, but denied by the defendant that the defendant's cheque was also to be held until after that date. On the morning of the 27th of June, Forbes & Lownsbrough suspended payment, and about noon on that day, closed their doors. At this time they had in their hands a large balance at the credit of the defendant. As soon as their suspension became known, the defendant sent to their office, ascertained the amount standing at his credit in their books, and at once had a writ issued against them to recover the amount, the writ being served on the same day.

The amount for which the action was brought included the amount of the cheque in favour of Park, which had not up to that time been presented. McCabe stated that he did not know when the writ was issued that the amount of the cheque in question was included. After the 1st of July the cheque of Park was presented for payment and paid. The cheque of the defendant was never presented for payment. Negotiations took place between Park and the defendant, and letters passed between them in reference to the re-payment by the defendant of the amount of Park's cheque. In one, dated the 3rd January, 1885, the defendant wrote to Park as follows: "Yours of the 31st ult. came to hand yesterday. The cheque to which you refer was given for mine, as you know, but which

was not presented in due course, and in the meantime the drawees suspended. There were ample funds in their hands to meet it had it been duly presented, and had this been done it would have been paid. You know as well I who should bear the loss, if any, being an old banker. I think I can aid you in securing this claim, and will cheerfully do so, and think it will be to your interest." Statement.

On the 19th January, 1885, Park saw the defendant in Toronto, and after some discussion, the following memorandum, which was drawn up by the defendant, was signed by Park :

To WM. MCCABE, Esq., Toronto.

Please take judgment when you think best against H. R. Forbes and Thos. Lownsbrough, recently trading here as bankers under the name of Forbes & Lownsbrough, to include the amount of your cheque for \$575 to me, dated June 26th, 1884, upon the understanding that the same is to be paid me out of the first proceeds of such judgment. You are to exercise your best discretion in the matter.

(Signed) L. GOLDMAN.

(Signed) ROBT. H. PARK.

The defendant after this proceeded with his action against Forbes & Lownsbrough, and obtained judgment against them and issued execution thereon, but up to the time of the bringing of the action, nothing had been realized under the judgment. The firm of John Garrett & Co., became insolvent, and the claim of Park against the defendant was acquired by the plaintiff under the sale of book debts. This action was then brought—for money lent by Park to the defendant, and not upon the unpaid cheque of the defendant,—the defences being that Park had been guilty of laches in not presenting the cheque before the suspension of Forbes & Lownsbrough, and in the alternative that a settlement had been agreed to, which the defendant had carried out.

The action was tried before ROSE, J., at Hamilton, on the 29th March, 1888, when Park swore distinctly that he

Statement. had no idea in signing the memorandum that he was releasing the defendant from his liability to him for the amount represented by his cheque. The defendant said: "My recollection is I told him the matter was in such a form that judgment could be entered, but I would have to decide whether to include his claim with mine, or reduce the amount for which Forbes & Lownsbrough had been sued." And Park also said: "What was said amounted simply, so far as my memory serves me, to a general agreement as to the course of procedure about the cheque, that is, he was to sue for the sum total of his claim, inclusive of that cheque, as if it had not been drawn, and that the whole, or a sufficient part of the first proceeds of the suit, were to pay me that cheque."

On the 18th May, 1888, judgment was delivered in favour of the defendant, the learned Judge stating that he was unable to find that there was any agreement to postpone presentment of the defendant's cheque, and being of the opinion "that a settlement had been arrived at between the parties, whereby the dispute between them as to the liability of the defendant was put an end to by the defendant agreeing to go to the expense of taking judgment against Forbes & Lownsbrough, and paying the plaintiff's claim out of the first proceeds."

This judgment was reversed by the Queen's Bench Division, that Court holding that the memorandum of the 19th January, 1885, did not operate as a release or accord and satisfaction; that there was an agreement to postpone presentment of the defendant's cheque, and that even if there were not, the suspension of Forbes & Lownsbrough took place before the time for presentment expired, and that the plaintiff, therefore, was entitled to recover.

From this judgment the defendant appealed, and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 14th of March, 1889.

Robinson, Q. C., and *Bigelow*, for the appellant. The Argument. cheque of the defendant should have been presented for payment before the suspension of the bankers, and not having been presented for payment, the defendant is released from any liability thereunder. Assuming, however, that the defendant was, notwithstanding the want of presentment, still liable to pay the amount of the cheque, then the agreement entered into between the parties was accepted in full satisfaction of that liability. There was a *bond fide* dispute as to the liability and good consideration for the agreement, and the defendant can be liable only under the terms of that agreement: *Bidder v. Bridges*, 37 Ch. D. 406; *Sibree v. Tripp*, 15 M. & W. 23; *Foakes v. Beer*, 9 App. Cas. 605; *Cumber v. Wane*, 1 Sm. L. C. 9th ed., 357.

Osler, Q. C., for the respondent. The defendant's cheque was worthless at the time it was given, and never would have been paid, so that presentment was unnecessary. At all events the suspension of the bankers took place before the time for presentment expired, and before this time expired, the defendant brought his action for the whole balance at his credit in the books of the bankers, including the amount of the cheque, and thus revoked the cheque and countermanded payment of it. After the service of the writ in that action, Park could not have obtained payment, so that want of presentment was excused: *Morse on Banking*, 3rd ed., sec. 425; *Daniel on Negotiable Instruments*, 3rd ed., secs. 1587, 1591. The agreement is no accord and satisfaction. It is simply an authority to the defendant to sign judgment without further altering his position, but the issue of the writ had effected the revocation of the cheque, and at the time of the agreement the defendant had already placed himself in such a position that he could not object to want of presentment. At best this agreement is merely a suspension of the remedy against the defendant, and a reasonable time for obtaining anything under the judgment having been given and no probability of payment having been shown, a mere possibility of future

Argument. payment cannot defeat the action. The agreement was not accepted in satisfaction of the defendant's liability, but performance of the agreement, and performance within a reasonable time. *Bidder v. Bridges*, 37 Ch. D. 406, does not apply. In that case additional security was given. *Robinson*, in reply.

April 30th, 1889. BURTON J. A. :—

I do not see that there is necessarily any conflict of evidence in the statements made by the plaintiff and defendant, but simply a misapprehension of the effect of what took place when the exchange of cheques was made. I think it very natural when Park proposed the exchange of cheques, stipulating that his own should not be presented before the first of the following month, that he may have inferred that McCabe would understand the restriction to apply to both, whilst the other might very naturally suppose that the borrower wanted the money till the end of the month, and that whilst his own cheque therefore was not to be presented until the 1st July, he was at liberty at once to use the other.

There was no reason in McCabe's case why his cheque should not be presented, and he swears positively that no such stipulation was made, and it is consistent with his subsequent conduct and statement, and with his letter of the 3rd January, 1885. I think therefore that the case must be treated as if it were an exchange of cheques with a restriction simply as to the presentation of Park's, if that can help the defendant, which for reasons I shall presently state I think it cannot.

I am of opinion that the action is misconceived, being for money lent; no such relationship as creditor and debtor upon that basis having been at any time created. Each was the holder of the other's cheque for value, and the only right of the plaintiff to recover is upon the cheque, and if the defendant's view of the law in reference to the time of presentment had been correct the plaintiff must

have failed. The defendant was in error however in that respect, as the plaintiff had the whole of the 27th in which to present the cheque, and before the expiration of that time the firm of bankers on which it was drawn had failed.

Judgment.
BURTON
J.A.

This is the defence raised on the pleadings and relied upon by the defendant in his evidence. The defendant himself emphatically declares: "The position that I take is that he ought to have presented it, and had he done so he would have got the money."

I think the notice given to the bankers by the service of the writ demanding the whole balance was a countermand of the cheque, so as to dispense with subsequent presentment and notice, even if that had been relied on as a defence.

As to the accord and satisfaction the Divisional Court have come to a different conclusion from that arrived at by the Judge at the trial. There is nothing upon the face of the document necessarily leading to the conclusion that it was intended so to operate, and the evidence as reported to us is not at all conclusive. We are now dealing with the judgment of the Divisional Court, and before interfering must be satisfied that it is wrong.

In the face of Park's denial, and the want of any positive statement by the defendant, I am not prepared to say that it is wrong, and I feel the less hesitation in doing so from the way in which the defendant in his evidence attempted to confine the plaintiff's remedy to the proceeds of the judgment, and not to the dividends payable out of the estate.

The plaintiff's remedy has been misconceived throughout, and if there had been anything to shew that the objections had been taken at the proper time my own view would have been not to allow the plaintiff any costs, but I see no reason under the circumstances for departing from the ordinary rule, and agree therefore in dismissing the appeal with costs.

Judgment. OSLER J. A. :—

OSLER
J. A.

The plaintiff, as assignee of Park, now sues to recover the \$575, which, as he alleges, is money in the defendant's hands belonging to him in consequence of the non-payment of the cheque he gave to Park.

In strictness the action should have been brought upon the cheque, and not as for money lent by Park to the defendant, but the facts are fully, though confusedly, stated.

It would have been proper, and indeed necessary, had the defendant taken the objection by pleading or demurring, to allege that the defendant's cheque had been duly presented for payment, or an excuse for, or waiver of, non-presentment.

The only defence pleaded, except the special defence to be afterwards noticed, is the following :

" 4. The said Robert Hood Park did not present the defendant's said cheque for payment, but held the same until after the said Forbes & Lownsbrough had suspended payment.

" 5. At the time said cheque was given to said Robert Hood Park, there were more than sufficient funds to pay the same in the hands of said Forbes & Lownsbrough belonging to the defendant, and had said cheque been presented for payment in due course, the same would have been paid, but the said Robert Hood Park, by his laches and neglect in not presenting same, did not receive payment of said cheque from said Forbes & Lownsbrough by reason of their having made an assignment after the giving of said cheque."

Taking this pleading in connection with the conduct of the defence throughout, I have no doubt that the defendant cannot now for the first time be allowed to suggest, or perhaps I should say that the Court ought not to be astute to suggest, as a defence, that the cheque was not in fact presented after the suspension of the drawees and before action. No such objection has been taken at any stage of the cause. It is not put forward in the reasons of

appeal, nor was it even suggested by counsel on the argument before us. Presentment would have been futile after suspension, and its omission did not prejudice the defendant, whose defence has been rested throughout upon the supposed laches of Park in not presenting the cheque *before* the drawees suspended payment, and not upon a mere omission to present it formally before action. His defence is, as I have said, so pleaded, and it is thus sworn to by him at the trial :

Judgment.

 OSLER
J. A.

"Q. What is the position that you take? A. The position that I take is, that he ought to have presented it, and had he done it he would have got the money.

"Q. Prior to noon of the 27th of June? A. No; I presume he would have presented it on the day he got it—on the 26th."

At this stage of the cause, the objection is wholly without merit. The real defences—those which the defendant himself thought important—have been tried, and it would be small kindness to allow the appeal on an objection he never cared to raise, as the plaintiff, for aught I see, might still formally present the cheque and maintain a new action. I have no doubt the defendant must be treated as having waived presentment of the cheque after suspension of the bankers, as a matter which did not affect him in the slightest degree. Moreover, after the suspension and the bringing of the action to recover his balance it is impossible that the defendant can have had any reason to expect that his cheque would be honoured, and for this reason presentment and notice of dishonour are, in my opinion, excused, since, in such circumstances, the defendant cannot have sustained any damage by their omission.

I think this is sustained, though no doubt none of the cases are exactly in point, by *Carew v. Duckworth*, L. R. 4 Ex. 313; *Wirth v. Austin*, L. R. 10 C. P. 689; *Terry v. Parker*, 6 A. & E. 502; *Cohen v. Hale*, 3 Q. B. D. 371. I refer also to *McLean v. Clydesdale Banking Co.*, 9 App. Cas. 95.

It only remains to point out that there is no defence on

Judgment.

OSLER
J.A.

the ground of laches of the payee in not presenting the cheque before the suspension of the drawees, as he received it on the 26th June, and the bankers suspended payment on or before noon of the following day. A reasonable time for presentment had not then elapsed. It is now firmly established that the holder has the whole of the banking hours of the day after he has received it within which to present the cheque.

In Byles on Bills, 13th ed., p. 20, it is said: "The drawer's liability on the cheque is not discharged, however great the delay in presenting, unless some loss be occasioned to him by the laches of the holder, and there cannot be laches earlier than the expiration of banking hours on the day after the cheque issued." See also, Chitty on Bills of Exchange, p. 348: *Alexander v. Burchfield*, 7 M. & G. 1061.

It is clear then that the holder had not been guilty of laches up to the time the bankers suspended payment, and equally so that non-presentment after that time has not prejudiced the defendant.

The further defence of accord and satisfaction is relied upon, and is said to be proved by the following agreement. (The learned Judge read the memorandum, *ante* p. 297, and continued:)

I agree with the view taken of this memorandum by the Queen's Bench Division, and with the inference they have drawn from the evidence.

The agreement is not in terms expressed to be taken in satisfaction of the defendant's cheque, or to be in settlement of Park's claims thereon, or to be a compromise of a doubtful claim. The caution with which the defendant expresses himself about it is remarkable. He speaks of "interviews and correspondence" with Park, not of what was said or done; and, of what occurred when the memorandum was signed he says merely this: "Mr. Park called; he was in the company's office on the 19th January; I was going down street and met him; he said he was going to call, and I turned back with him. I have a very strong im-

pression to that effect, but am not positive. However, we went to the office, and the result was, we arranged the matter as I understand of this agreement." He adds that pursuant to it he had judgment signed by his solicitors.

Judgment.

OSLER
J.A.

The cross-examination having given him no opening to enlarge or explain his statement he is pressed on re-examination for something more definite; and then proceeds to explain that it was not in consequence of getting the memorandum from Park that he went to the expense of entering judgment, as my learned brother Rose, who tried the case, seems to have thought. He meant to enter judgment, the only question with him was, whether he should include the amount of Park's cheque.

"Q. For what amount did you propose entering judgment if you did not get that (the memorandum)? A. I would have to abandon to that extent.

Mr. Bigelow.—What was said about it then? A. I cannot recall any specific conversation.

Q. In general terms, what was said? A. My recollection is, I told him that the matter was in such a form that judgment could be entered, but I would have to decide whether to include his claim with mine or reduce the amount for which Forbes & Lownsbrough had been sued.'

It is difficult to understand what object was to be gained by entering judgment at all, unless indeed, as some expressions in his evidence seem to suggest, the defendant was making a mental distinction between paying the plaintiff out of the dividends to be received from the assignee of Forbes & Co., and paying it out of "the first proceeds of the judgment."

I think the evidence falls very far short of proving a settlement or compromise of a doubtful claim. I cannot see that Park ever believed or supposed that his claim was doubtful, or that he had any reason to do so. I have not referred to his evidence, although, as the learned Judge has not discredited it, there is no reason to reject it, but he merely negatives very clearly and decidedly what the defendant has not ventured to affirm. Unless, therefore, the memorandum itself necessarily imports an abandonment

Judgment.

OSLER
J.A.

of the claim upon the cheque, and the acceptance of a new and substituted mode of obtaining payment, the defence pleaded is not proved, for there is really no other evidence in support of it. I am of opinion that nothing of this kind can be drawn as a conclusion of law from the agreement and the defendant has not ventured to assert it.

I would dismiss the appeal.

I refer to *Evans v. Powis*, 1 Exch. 601; *Good v. Cheesman*, 2 B. & Ad. 328; *Goodrich v. Stanley*, 24 Conn. 613; *Barclay v. Bank of New South Wales*, 5 App. Cas. 374; *Parsons on Contracts*, 3rd ed. pp. 817, 820.

MACLENNAN J. A.:—

The pleadings in this case are not very creditable to the solicitors on either side. The action is brought for money lent, whereas it is quite plain that when the parties exchanged their cheques each became the holder of the cheque of the other for valuable consideration, and their respective rights and liabilities were the same as those of any other holder of a cheque.

It is not disputed that Park's cheque was not to be presented before the 2nd of July. As to McCabe's cheque however there is a dispute, McCabe saying there was no agreement that presentment should be delayed, and Park saying there was. The learned Judge who tried the action says he is unable to find there was any agreement to that effect. The cheque itself is in the usual form and imports the right and obligation of presentment according to law, and it is not pretended there was any reason why Park should not have drawn the money at once. The transaction was altogether for Park's convenience and accommodation, and McCabe had ten times the amount of the cheque in the bank.

I have considered the evidence with great care, and I am unable, with great deference, to come to a different conclusion from that of the learned trial Judge, who was unable to find there was any agreement to postpone the present-

ment of the defendant's cheque, or to agree with the conclusion of the learned Chief Justice of the Queen's Bench Division that the McCabe cheque was not to be presented until the beginning of the month.

Judgment.

MACLENNAN
J.A.

In the absence of an agreement to postpone presentment, Park was bound to the same diligence as any other holder of a cheque for value.

The cheques were negotiable instruments, and could and might have been passed over to strangers to the original transaction, and I am at a loss to understand why the defendant should be blamed for presenting and obtaining payment of the cheque held by him, or for raising the question which of the two should bear the loss resulting from the failure of the bankers. If McCabe had neglected to present the cheque held by him with due diligence, and Park's bankers had failed, he might have had to bear the loss of both cheques.

This action then should properly have been brought upon the defendant's cheque, and it is evident that the plaintiff has no other cause of action. If the plaintiff is allowed on this record to claim as for an unpaid cheque, I think the same freedom might be allowed to the defendant to rely upon any defence afforded by the facts whether it is on the record or not.

Now there was no presentment or notice of dishonour of this cheque before action; and I think the law applicable to cheques in this country is that stated in Byles on Bills, 11th ed., pp. 21, 202 and 292, that presentment and notice of dishonour are just as necessary in the case of cheques as in the case of bills of exchange, in order to make the drawer liable; and that the bankruptcy or insolvency of the drawee makes no difference.

In *Carew v. Duckworth*, L. R. 4 Ex. 313, at p. 319, Lord Bramwell says: "I wish to add that if there were funds in the hands of the bank sufficient to meet the cheque, the drawer would be entitled to notice, though he knew that the bank would not honour the cheque, for he would be entitled to say they were bound to honour it, even though they had told him they would not."

Judgment.

MACLENNAN
J.A.

The plaintiff must, therefore, make out some good excuse in law for not presenting this cheque or giving notice of dishonour.

I was at first of opinion that there was no such excuse, but further consideration has led me to adopt the conclusion of my learned brother Osler, that the act of the defendant on the 27th June, of serving his bankers with a writ demanding payment of all the money then standing at his credit with them, is in law such an excuse.

A cheque is not either in law or equity an appropriation of so much money of the drawer in his banker's hands to the payee, or to the holder of the cheque: *Hopkinson v. Forster*, L. R. 19 Eq. 74. The payee or holder of a cheque has no privity with the banker, at all events not without something equivalent to acceptance by the banker, by marking the cheque good, or otherwise. He cannot sue the banker in case of refusal to pay, even though there be sufficient funds. It is only in favour of the drawer that the banker is under any obligation, and he can only be sued by him. It follows from this that all the money in the hands of the banker continued in law to be the defendant's money notwithstanding the cheque which he had given Park. As long as Park had not presented the cheque and obtained payment, or pending promise of payment, the defendant could withdraw all his money, or could sue for it, or could countermand payment of the cheque, and the banker could make no resistance. In law and in equity it was all the customer's money, and the banker must answer to him for it. Now in this case before Park presented his cheque the defendant sued for the whole sum. He had an undoubted legal right to do so, and to proceed for its recovery, and the banker could make no defence. It is also clear in my opinion that the holder of the cheque could not interfere on any ground of equity, for whenever he chose to present his cheque for payment, he had an adequate remedy at law by action on the cheque for non-payment.

Now, I think the effect of the action brought by the defendant was to put it out of the power of the banker to

pay the cheque, even if it were presented, and so to operate as a countermand of payment of the most peremptory kind.

Judgment.

MACLENNAN
J. A.

The defendant says that when he gave instructions for the action to be brought, he supposed the Park cheque had been paid. I think that makes no difference.

I think before giving such instructions, he was bound to know whether it had been presented or not; or if he chose not to find out, he was bound to know that as regards cheques not yet presented, what he did operated in law as a countermand of payment.

It is well settled that want of effects in the hands of the drawee of a bill, excuses both presentment and notice of dishonour as between the holder and the drawer: Byles on Bills, 13th ed., pp. 220 and 298. Here there were funds when the cheque was given, but before the time allowed to the holder by law to present it had elapsed, the funds had been, in effect, withdrawn; that is to say, the drawer had done what he had a right to do, brought an action to recover the money.

In *Hill v. Heap*, D. & R. N. P. C. 57, Abbott, C. J., at Nisi Prius, held that mere orders given by the drawer of a bill of exchange to the drawee not to pay the bill if presented, was not sufficient to excuse presentment, though it was sufficient to excuse the want of notice, because even in such a case it cannot be certainly known without presentment whether there are effects. I think, however, that the bringing of an action is a different thing from a mere order not to pay; the one effectually withdraws the assets from the hands of the drawee, the other does not; and the case of *Carew v. Duckworth*, already referred to, is, I think, an authority in favour of the proposition that what the defendant did, was sufficient to excuse presentment.

The result is, that when the defendant asked the banker for his balance, he at once became liable to the holder of his cheque; and he is liable still unless the claim on the cheque has been got rid of by the agreement set out in the defence.

Judgment.

MACLENNAN
J.A.

Upon the whole, after much consideration and with some doubt, I have arrived at the conclusion that the judgment of the Divisional Court on this point is right, and should be upheld. The ground on which the trial Judge decided the case, is not set up in the defence—namely, that the parties had settled a dispute which they had about the cheque by the defendant agreeing to go to the expense of taking judgment and paying the plaintiff's claim out of the first proceeds. What is set up is, that the agreement in writing set out was entered into between them in full settlement of the cheque. Now, it is hardly conceivable that if what they meant was to put an end to a dispute, or to make a new agreement which should be a satisfaction and discharge of the cheque, and the whole claim of \$575, these experienced business men should have drawn this loose paper, and that it should have been signed by one of them only. The document does not contain anything indicating that they had settled a dispute, or had put an end to the original demand, but rather the contrary, in my judgment. The understanding is said to be "that the same, (that is the \$575,) is to be paid me out of the first proceeds of the judgment," not a word said of what should happen if there were no proceeds, or not sufficient proceeds. All that, if it really was agreed, must be supplied by parol evidence, and if proper to be so supplied at all, I confess I am unable to find it.

I think the appeal should be dismissed.

HAGARTY C. J. O. concurred.

Appeal dismissed with costs.

RYAN V. CLARKSON.

Assignment for the benefit of creditors—Costs of creditor having execution in sheriff's hands—R. S. O. cap. 124, sec. 9.

Held, [BURTON, J.A., dissenting], affirming the judgment of ARMOUR, C.J., that under R. S. O., cap. 124, sec. 9, the costs for which the execution creditor has a lien are the costs not of the execution only but all the usual costs which could be recovered from the debtor under an execution.

THIS was an appeal from the judgment of ARMOUR, C.J. Statement.

The plaintiff had brought an action against one Joseph Kidd to recover the amount of an alleged indebtedness, and a reference was directed to the Master, who found that there was due from Kidd to the plaintiff the sum of \$522, and directed that Kidd should pay the costs of the action. These costs were taxed at the sum of \$795.55. Kidd had paid to the plaintiff after the action had been brought the sum of \$900, which was applied first in payment of the debt and interest, and judgment was entered against Kidd for the sum of \$498.50, being the balance of costs still due.

On the 15th of December, 1887, writs of execution against the goods and lands of Kidd were issued by the plaintiff, and placed in the hands of the sheriff of the county of Perth, these being the only writs against Kidd in the sheriff's hands. Under the writ of execution against goods the sheriff seized certain goods and chattels of Kidd, sufficient in value to have enabled him to make thereout the amount due to the plaintiff under the writ. On the 16th of December, 1887, while the goods were under seizure, Kidd made an assignment to the defendant for the benefit of his creditors, pursuant to 48 Vic. ch. 26 (O.), and the Acts amending that Act, and the defendant took into his possession as such assignee the goods and chattels of Kidd, including those seized by the sheriff. The plaintiff subsequently filed with the defendant an affidavit proving his claim against the estate of Kidd at the sum of \$562.83, being \$498.50 for costs of suit, \$12 costs of the executions, \$41.33 sheriff's fees, and \$11 interest on \$498.50 from the 15th of Decem-

Statement. ber, 1887, to the 26th of April, 1888, the date of the making of the affidavit, and the plaintiff claimed that this amount should be paid to him in full out of the proceeds of the estate of Kidd in the hands of the defendant.

The defendant offered to pay in full the costs of the writ of execution against the goods and the proper fees of the sheriff in connection therewith, but refused to pay the balance of the claim in full, and contended that in respect of that balance the plaintiff should rank as an ordinary creditor. There were sufficient assets in the hands of the defendant to pay the claim of the plaintiff in full, but not to pay in full the claims of all the creditors. This action was then brought by the plaintiff to recover payment in full from the defendant of his claim, and came on to be heard before ARMOUR, C. J., upon motion for judgment upon the pleadings, and on the 31st of October, 1888, the following judgment was delivered in favour of the plaintiff:

“It was admitted by the pleadings that the plaintiff, on the 15th day of December, 1887, recovered judgment for debt and costs against one Kidd; that on the same day he placed writs against goods and lands in the hands of the proper sheriff, and that on the same day the said sheriff seized sufficient goods of the said Kidd to satisfy the said debt and costs. It was also admitted that on the 16th day of December, 1887, the said Kidd made an assignment to the defendant for the benefit of his creditors under the provisions of the Act, R. S. O. ch. 124, of all his real and personal estate. It was also admitted by the defendant that the plaintiff was entitled to be paid in full the costs of the writ of execution against goods and the sheriff's proper expenses in connection therewith, but it was denied by him that the plaintiff was entitled to be paid in full any other part of his costs.

The Act, 48 Vic., ch. 26, sec. 9, gave an assignment for the general benefit of creditors under that Act precedence of all judgments and of all executions not completely executed by payment.

This section was amended by section 2 of the Act, 49 Vic.

ch. 25, by adding thereto the words : " Subject to the lien, if any, of an execution creditor for his costs where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs who has the first execution in the sheriff's hands," and so amended this section stands as section 9, R. S. O. ch. 124. Statement.

I am of opinion that the words used therein " for his costs," mean for his whole costs of recovering judgment, issuing execution, and of the sheriff's fees thereon, and are not to be limited, as was contended, to the costs of the writ of execution against goods and the sheriff's proper expenses in connection therewith.

A similar construction was put upon similar words used in 29 Vic. ch. 18, sec. 13, by the Court of Queen's Bench in *Re Heyden*, 29 U. C. R. 262, followed by the Court of Chancery in *Canada Landed Credit Co. v. McAllister*, 21 Gr. 593.

There will be judgment therefore for the plaintiff with costs."

From this judgment the defendant appealed, and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.), on the 19th of March, 1889.

Foy, Q.C., for the appellant. The lien, if any, is confined to the costs of the execution creditor *qua* execution creditor, that is to the costs of the *fi. fa.*, and the sheriff's fees incident thereto. The amending words of 49 Vic. ch. 25, sec. 2, have not the effect claimed by the respondent. The original Act abolishes all preferences and these amending words conferring a new right must be strictly construed, and do not clearly express any intention to give a lien for more than the costs of the execution. Where the Legislature has intended to give any lien for the costs of an action they have clearly said so. See 49 Vic. ch. 16, sec. 35, where the Creditors' Relief Act is amended, and compare also the language of the Insolvent Act of 1875, 38 Vic. ch. 16, sec.

Argument.

3 (K), and of 29 Vic. ch. 18, sec. 3. The case of *Re Heyden*, 29 U. C. R. 262, and the other case cited in the judgment appealed from, are not authorities in this case. In this case the amending words enlarge the rights of the execution creditors while the words under consideration in *Re Heyden* curtailed the previously existing rights of the execution creditor. There is no reason why a creditor obtaining judgment and seizing should have any preference, as the other creditors in a case like this, where a voluntary assignment is made, are not in any way benefited by his so doing. Under the Insolvent Act the seizure by one execution creditor gave the other creditors a right to issue an attachment in insolvency, and under the Creditors' Relief Act the seizure and sale by one creditor may be taken advantage of by all the creditors, and there is therefore in such cases a reason for the preference.

Idington, Q.C., for the respondent. The respondent's right was absolute at the date of the assignment, and can only be invaded by legislation which clearly curtails it. The proper construction of the section is to give to the execution creditor all his costs which formed, or had become, a lien on the debtor's property at the date of the assignment: *Re Heyden*, 29 U. C. R. 262; *Canada Landed Credit Co. v. McAllister*, 21 Gr. 593; *Porteous v. Myers*, 12 A. R. 85.

April 30th, 1889. OSLER J.A.:—

The 9th section of the Act relating to assignments and preferences as it stood in 48 Vic. ch. 26, enacted that an assignment under the Act should take precedence of all judgments, and of all executions not completely executed by payment. We need not enquire why it was thought necessary to provide that it should take precedence of judgments as well as of executions, nor what the expression "executions not completely executed by payment," may extend to or include. It is sufficient to say that an execution under which, as in the present case, nothing more has

been done than to make a seizure of the debtor's property, may be said to be such an execution. The section was by 49 Vic. ch. 25, sec. 2 amended "by adding thereto" the following words: "subject to the lien, if any, of an execution creditor for his costs where there is but one execution in the sheriff's hands, or to the lieu, if any, of the creditor for his costs who has the first execution in the sheriff's hands." The effect of an amendment thus made is that it forms part of the original section, and does not come in as conferring a new right upon a creditor who had been by a former statute deprived of one: *Allan v. Great Western R. W. Co.*, 33 U. C. R. 483; *Scott v. Great Western R. W. Co.*, 23 C. P. 182.

Judgment.

OSLER
J. A.

What is here meant by "lien, if any, for his costs"? It is not strictly accurate to speak of the lien of an execution creditor upon goods seized by the sheriff, but the legislature must have intended by these words to give the creditor some advantage where the assignee becomes entitled to intercept the completion of the execution, and they may at all events be construed as referable to the possession of the sheriff when he has made a seizure under the writ, of the benefit of which the creditor is not to be entirely deprived. An assignment then, is to take precedence of executions not completely executed by payment, subject to the lien of a particular execution creditor for "his costs."

It is contended that this means the costs of the writ of execution, (and perhaps the sheriff's fees), only. I think the answer is that the legislature has not said so. The taxed costs of suit are as much the costs of the execution creditor, or the "creditor" as the costs of the writ.

It is said that there is no reason for giving the execution creditor these costs where he is cut out by an assignment, though there may be where goods are seized under an execution and are afterwards sold, and the proceeds distributed among other execution creditors under the Creditors' Relief Act, as in the latter case the creditor seizes and preserves the debtor's property for the benefit

Judgment.

OSLER
J. A.

of all. But if the section is to be construed by considerations of that kind there is no reason why the creditor should have any costs at all in the case of an assignment, or why any distinction should be made between the costs of suit and the costs of the execution, for none of his proceedings have been beneficial to the other creditors, but the reverse. I do not see the justice of confining the right to the first execution creditor where there happen to be several, since the sheriff seizes under all the writs in his hands, but if one is to reason from anything but the plain words of the clause, the fact of doing so indicates that the whole costs were intended to be paid. If such a trifle as the costs of the writ merely, were intended, the right would probably have been extended to all execution creditors, since that could have been done without seriously affecting the estate, and where none have aided in preserving it, all should in justice stand on the same footing.

Section 26 of the Creditors' Relief Act has been pointed to, and it has been argued that as the legislature has there given "the taxed costs and the costs of the execution" to the creditor at whose instance and under whose execution the seizure and levy were made we should infer that they meant by section 9 of the Assignment Act to give only the costs of the execution to the execution creditor in the case of an assignment. In other words that where language has been used which in terms means *all* costs, we are to cut it down to mean part of the costs because in another Act the legislature has spoken of taxed costs and costs of the execution respectively. "I prefer to take the language of the legislature, and to put no gloss on it whatever," especially as I find in section 20 of the Absconding Debtors' Act, R. S. O. ch. 66, that when they meant to give the costs of the writ only they knew how to say so.

I think the intention of the legislature was to put the seizing creditor, or the first of several creditors, in the same position as he is placed by the Creditors' Relief Act, and to provide that the voluntary act of the debtor, in making an assignment after seizure, shall not place him in a worse

position than he would have been in if the distribution of the estate had been worked out by the sheriff under the Creditors' Relief Act.

Judgment.

OSLER
J.A.

I cannot see that in principle it makes any difference that the plaintiff's judgment is recovered for costs only, and am of opinion that the judgment of the learned Chief Justice of the Queen's Bench Division is right, and should be affirmed.

MACLENNAN J.A. :—

I agree in the judgment of my brother Osler.

I am of opinion that the plain and ordinary meaning must be given to the word "costs," and that it must mean all the usual costs which could be recovered from the debtor under execution.

HAGARTY C.J.O. concurred.

BURTON J.A. :—

I think with great deference that the decision in *Re Hayden*, 29 U. C. R. 262, under the language of section 13 of the Insolvent Act of 1865 has little or no application to the case we are now considering.

At the time of the passing of the Insolvent Act a creditor having obtained judgment and lodged execution with the sheriff, obtained a lien upon all property which the sheriff seized, both for debt and costs. The Legislature interfered with this right by declaring that that lien should not prevail as against the assignee, but the Act made an express exception of the lien which the plaintiff previously possessed for his costs, in other words that lien was not to be interfered with, but should exist and continue as if the Insolvent Act had not been passed.

On the contrary at the time of the passing of 49 Vic. ch. 25, no right to costs, either of obtaining judgment or execution existed :—in the event of an assignment having

Judgment.

BURTON
J.A.

been made by the execution debtor for the benefit of creditors, such an assignment took precedence of all judgments and executions not fully executed, and the money paid over by the sheriff (such at least is my understanding of the words "executed by payment"), but at all events did away absolutely with the lien created by lodging an execution, and levying on the property of the debtor,—and we have to read the words of 49 Vic. ch. 25, sec. 2, not as interfering with any existing right, but as giving to the creditor something to which he was not previously entitled, and found as these words are in an Act the chief aim and object of which was to abolish preferences, and to secure the distribution of the insolvent's estate equally among all without priority, they ought to receive the very strictest construction of which they are capable.

There would be something bordering on absurdity in the supposition that the Legislature intended to give a preference to a judgment creditor for all his costs, if he had lodged an execution, and refuse it to half a dozen other creditors who had gone to the expense of obtaining judgment, but had not lodged an execution.

Can any good reason be suggested why a distinction should be drawn between a claim consisting of costs, and one in which the creditor had a few days before the assignment made an advance in cash?

Here then we find that at the time of the passing of the Act in question neither a judgment nor an execution creditor possessed any preferential claim, but the Legislature thought it right to make an exception, and, as I have said, in an Act abolishing preferences these words ought not to be construed as creating a preference larger than the words strictly warrant.

The Creditors' Relief Act had provided that in the event of an execution remaining unsatisfied in the sheriff's hands till within two days of the time fixed for the sale certain parties should be entitled to participate in the proceeds in the event of a sale, but it was only in case of a sale under the writs that this right existed, and the benefit was con-

fined to a very limited class, and if the debtor made an assignment for the benefit of creditors before the sale the whole of the executions were swept away, and the parties holding them were driven to prove and take a dividend with the other creditors.

Judgment.
BURTON
J.A.

In the same session in which 49 Vic. ch. 25 was passed an amendment was made to the Creditors' Relief Act, giving to the execution creditor by whose exertions the property had been made available, even for that limited class, a preferential right to his costs in the event of a sale under the executions, but not otherwise ; if an assignment intervened all creditors alike ranked on the estate for a dividend.

The Legislature did however as I have pointed out make a change also in the Assignment Act, and it is not unimportant to bear in mind the difference in the language of the two statutes.

In the Relief Act, under which this limited class of creditors who were obtaining a preference over other creditors by means of the execution creditor's seizure were benefited, the 10th section provided for an equal distribution among that class for their debts and costs, and was amended thus : " after payment in full of the taxed costs and the costs of the execution to the creditor at whose instance and under whose execution the seizure and levy were made." Nothing can be more clear and explicit, and it strikes one as a most reasonable provision.

All this however as I have already pointed out was contingent upon the sale being made under the execution. If an assignment intervened then the assets of the debtor were to be applied as nearly as possible in analogy to bankruptcy, and therefore we find very different language used in reference to persons who might have obtained a lien under an execution ; it is not as in the other Act, passed on the same day, subject to the lien if any of the taxed costs, and the costs of the execution of the creditor under whose execution the levy was made, but subject to the lien " if any of an execution creditor for his costs where there

Judgment.

BURTON
J. A.

is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs who has the first execution in the sheriff's hands."

These words preserve not to the plaintiff or to the judgment creditor a lien for his costs, but to the execution creditor a lien for his costs, that is for his costs as such execution creditor simply, and as if to shew that it was intended to be so confined, the first one only is to be so preferred, if there are several executions in the sheriff's hands, presumably because the expenses of levy and possession are attributable to the seizure under that execution.

What then are execution creditors costs? Previous to 2 Geo. IV. ch. 1, sec. 19, a judgment creditor could levy only the amount of the judgment, that is, the debt and the taxed costs. That Act first enabled the sheriff to levy the costs of the execution and fees, over and above the amount recovered by the judgment.

Prior to that Act the taxed costs were the only costs recoverable and could be referred to only as the judgment creditor's costs, and the reference now to the execution creditor's costs is not so vague or uncertain as it might at first sight appear. These costs are strictly execution creditors' costs, the costs first given to execution creditors under the Act to which I have referred, and for which probably the judgment creditor could not rank for a dividend, as these costs are not given, as the other costs are, as part of the judgment, but power is simply given to the sheriff to levy these costs in addition to the sum mentioned in the judgment. If this be so the execution creditor would be in a less favourable position than any other creditor for he could not get his dividend upon these costs, whereas if he is allowed simply the costs of the execution—for which he could not rank upon the dividend sheet—as a prior legal claim, he stands in every respect precisely in the same position as every other creditor.

The intention might have been more clearly expressed, but looking at the state of the law when the statute was passed and the obvious intention to secure as far as possi-

ble an equal distribution, I find no difficulty in placing the construction upon the words contended for by the appellant, and I think this interpretation receives confirmation from the fact that in England the recent legislation, in case of bankruptcy, confines the execution creditor in a similar way, to the costs incurred by the proceedings under the writ.

Judgment.
BURTON
J.A.

The fallacy of the respondent's argument consists I think in this, that he assumes, contrary to the fact, that he had a right of which he could not be deprived except by express legislation; on the contrary he had no right except that which is in terms given him by the amending statute, and the right thus given ought not to be extended by implication, but strictly confined to the most restricted meaning which the words giving it are capable of bearing.

I think the appeal should be allowed.

*Appeal dismissed with costs, BURTON, J.A.,
dissenting.*

CANADIAN LOCOMOTIVE COMPANY V. COPELAND.

*Bill of lading—Rate of freight—Demand of freight at too high a rate—
Refusal of consignees to accept cargo—Sale of cargo by Master of vessel—
Expenses of sale—Damages—Demurrage.*

THIS was an appeal by the plaintiffs from the judgment of the Queen's Bench Division, (reported 14 O. R. 170), and came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.), on the 28th and 29th of January, 1889.

Britton, Q. C., and Rogers, for the appellants.

W. Cassels, Q. C., and A. W. Aytoun-Finlay, for the respondents.

May 14th, 1889. THE COURT (HAGARTY, C. J. O., dissenting) allowed the appeal with costs; agreeing with the Court below that freight was payable only at the reduced rate, but holding that it was the duty of the defendants to tender the coal to the plaintiffs with a demand for payment of freight at the reduced rate, and that not having done so, the sale was unauthorized, and the expenses in connection therewith could not be charged against the plaintiffs.

THE COURT also held, that, for the same reason, the allowance of damages in the nature of demurrage could not be sustained, but that the defendants were entitled to some compensation (fixed at \$100) for the delay of the plaintiffs in unloading the vessel, after the duty of unloading was actually undertaken by them.

MOLSONS BANK V. HALTER.

Bankruptcy and insolvency—Trusts and trustees—Assignment for benefit of creditors—Mortgage to secure moneys used by trustee in breach of trust—Trust estate not a creditor—Intent to prefer—Having the effect of preferring—R. S. O. ch. 124. sec. 2.

The defendant W., who was executor under the will of one J., made in favour of himself and the defendant H., who was his co-executor under the will, a mortgage to secure the repayment of trust moneys improperly used by W., in breach of trust. W. was at the time this mortgage was given, and continued to be, in insolvent circumstances but had made no assignment for the benefit of his creditors. The plaintiffs, execution creditors of W., attacked the mortgage.

Held, that no assignment having been made an execution creditor might attack the security and take advantage of section 2 of the Act, R. S. O. ch. 124.

Held, also, that neither H., nor H. and W. as executors, were, in the strict sense of the word, creditors of W., and that the mortgage therefore could not be set aside as having been given with intent to prefer, or as having the effect of preferring, one creditor to another.

Held, also, [OSLER, J.A., dissenting,] that the words "or which has such effect" in section 2, R. S. O. ch. 124, relate only to the immediately preceding clause dealing with the preference of one creditor over others, and this mortgage not being made with intent to defeat, delay, or prejudice creditors, could not be set aside on the ground that it had the effect of defeating, delaying, or prejudicing them.

Per OSLER, J. A.—These words apply to the whole of the antecedent part of the section, embracing as well conveyances made with intent to defeat, delay, or prejudice, as those made with intent to prefer only, and any conveyance or transfer by an insolvent, (with the exceptions specially mentioned in section 3), which has the effect of defeating, delaying, prejudicing, or preferring creditors, whatever may have been the intent with which it is made, is within the statute.

Judgment of MACMAHON, J., affirmed on other grounds.

THIS was an appeal from the judgment of MACMAHON, J. Statement.
dismissing the action with costs.

The defendants Wismer and Halter were executors under the will of one John Jantz, and Wismer had used for his own purposes about \$1,050 of the moneys of that estate.

He, on the 18th of May, 1888, when he was in insolvent circumstances, made, in favour of Halter and himself, as executors of the Jantz estate, a mortgage to secure the repayment of the sums improperly used by him.

The plaintiffs were execution creditors of Wismer, having recovered judgments against him on the 21st of June, 1888, and 6th of July, 1888, for large amounts, and brought this action to have the mortgage declared fraudulent and

Statement.

void. Wismer had not made any assignment for the benefit of creditors.

The action was tried at Berlin on the 1st of November, 1888, and was dismissed with costs on the ground that the plaintiffs, as execution creditors, could not sue under the Ontario statute.

At the trial the original judgments against Wismer were produced, and put in evidence.

The plaintiffs appealed, and the appeal came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.), on the 19th of March, 1889.

W. H. Bowlby, for the appellants. Special remedies are given to the assignee when an assignment is made, but when there is no assignment then creditors are entitled to take advantage of the ordinary provisions of the Act. If not, a debtor might give any preference he pleased by refusing to make an assignment. The special and exclusive rights given to the assignee are supplemental to the ordinary rights that may be exercised by an assignee or creditors. Under the Ontario statute the mortgage is clearly bad: *Rae v. McDonald*, 13 O. R. 352; *River Stave Co. v. Sill*, 12 O. R. 557.

W. Nesbitt, and *A. W. Aytoun-Finlay*, for the respondents. There is no proof of the judgments, the judgments against Wismer personally, being no evidence against him and Halter as executors, and no proof of insolvency. The Act 48 Vic. ch. 26, (O.) cannot be invoked by the plaintiffs. That is an Act relating to assignments by persons in insolvent circumstances, and cannot be taken advantage of unless an assignment is made: *Robertson v. Holland*, 16 O. R. 532. The transaction clearly cannot be attacked under the former law, and even if the Act 48 Vic. ch. 26 applies, the case does not come within it. That Act applies only to transactions between debtors and creditors, and this mortgage having been given to secure moneys used in breach of trust is not a mortgage to a creditor, and does not come within the Act: *Edwards v. Glyn*, 2 Ell. & Ell 29;

Ex parte Stubbins, 17 Ch. D. 58; *Ex parte Kelly*, 11 Ch. Argument. D. 306. There was no intent to defeat, delay, or prejudice creditors, and intent is still necessary.

Bowlby, in reply.

May 14th, 1889. HAGARTY C.J.O. :—

Our decision appears to turn on the construction we put upon the second section of R. S. O. ch. 124.

“ Every gift, conveyance, &c., made by any person at a time when he is in insolvent circumstances, &c., with intent to defeat, delay, or prejudice his creditors, or to give to any one or more of them a preference over his other creditors, or over any one, or more of them, or which has such effect, shall, as against them, be utterly void.”

I think for the reasons about to be stated by my brother Osler, that the co-trustee and cestui que trust for whose benefit the impeached mortgage was given, cannot be considered as creditors. I also think that the mortgage was not void under the 13 Eliz. The only ground on which the appellants can rest is, that we must read the words, “ or which has such effect,” as applying to the first branch of the section, and as not confined to the second.

In other words, has the Legislature in a most important particular altered the statute of Elizabeth, and made it to apply to a deed for valuable consideration, which, though otherwise good, yet its effect being to defeat or delay creditors, is to be avoided?

As at present advised I think the words only apply to the latter of the two suggested cases in the section, viz., that of giving one creditor a preference over others of the same class.

I fear the words have much embarrassed the general question; but we must be very cautious in not extending their application beyond the fair rules of construction of statutes.

The first branch of the section substantially repeats the provision of the 13 Eliz, the intent to defeat or delay cre-

Judgment.

HAGARTY
C.J.O.

ditors by alienation of property by gift or not for real valuable consideration, but not interfering with the preference of one *bond fide* creditor over another; our Act adding the express words as to being insolvent. The second branch seems specially aimed at destroying any preference, and to make it more efficacious, adds the provision, "or which has such effect," that is—as I read it—has the effect of giving the preference.

The equity decisions referred to shew that the replacing or securing of trust funds improperly used by a trustee, and for which he is accountable, is not to be invalidated under any bankrupt or insolvent legislation prohibiting the creation of preferences.

Are we to assume that our Legislature by such indirect language as is now before us intended to abolish that doctrine?

If they so intended I think we might reasonably expect that plainer and more explicit language would have been used.

The law of England is our law, until and unless specially altered by our Legislature. The whole section deals with debtors and creditors, and aims at equality and against the alienation of assets to delay or defeat creditors.

The act here sought to be impeached is declared not to be a dealing between debtor and creditor, but the section is invoked to defeat it at suit of a creditor. May we not fairly read the section as, in its first branch, providing for the avoidance of all alienation of assets, not to pay a just debt, but with the intent to defeat or delay creditors, and then, in the second branch, to prevent all preference of one creditor over another with intent to prefer, or which has the effect of preferring?

It is a well known principle in construing statutes not to impute to the Legislature the intention of altering existing laws unless the language used admits of no other reasonable interpretation.

The mortgage here impeached was made for good consideration; there was no intent whatever to defeat or

delay any creditor; it is made to persons not standing in the relation of creditors to the grantor, and I think it does not fall within any of the provisions of this section, which appears intended solely to regulate the relations between debtor and creditor.

Judgment.

HAGARTY
C.J.O.

BURTON J. A. :—

I quite agree that the mortgage sought to be impeached in this case cannot be avoided as a preference. The decisions referred to very clearly establish that the parties to it did not fill the relative positions of debtor and creditor, but of trustee and co-trustee.

Then upon the other point—so far as I am concerned, I am already committed to the view that the words “or which has such effect,” do not override the other words still to be found in the clause, which seem to indicate that to render such a transaction as this invalid, there must be an intent to defeat or delay creditors.

Every assignment of a man's property, however good and honest the consideration, must diminish the fund out of which satisfaction is to be made to his creditors, and necessarily have the effect of hindering and delaying them to that extent; they must be taken therefore in their legal or technical, and not their literal sense; and I find it difficult to think that so radical a change was intended to be effected by the addition of these words alone, found as they are in connection with those relating to the intent.

But I approve of the suggestion that the words, “or which has such effect,” may reasonably be held to refer to the last antecedent, that portion of the section which relates to preferences, and not to the whole section, and it receives support when we trace back the previous legislation.

In the year preceding that in which this amendment found its way into the statute, the Legislature amended R. S. O. (1877), ch. 118, by inserting after the words “with intent to give one or more of the creditors of such person a preference over his other creditors, or over any one or more

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BURTON
J.A.

of such creditors," the following: "whereby such one or more of the creditors of such person would obtain a preference over his other creditors, or over any one or more of such creditors," which left matters pretty much as before as regards preferences, but did not in the slightest degree affect transfers made with intent to delay.

But it was held that as regards preferences it was not only necessary to shew an intent to prefer, but that the act intended to have that effect did give a preference; it, in fact, restricted rather than enlarged the class of cases in which a preference would invalidate a transfer, and then without any other reason being alleged for the change than that to be found in the preamble to the present enactment, "that great difficulty is experienced in determining cases arising under the present law," we find the amendment of the previous session repealed, and the words I have referred to inserted, which may or may not refer to the whole section, or may be intended to secure the end sought to be carried out by the amendment of the previous session. I much fear that the Legislature has not succeeded in removing the difficulties referred to in the preamble, but has rather added to them. If it applies to the whole section it may be very difficult to reconcile and give effect to both expressions. If the intent to defeat or delay is proved, then the effect is immaterial; but if the effect alone is sufficient, what was the object of retaining the words which make an intent necessary.

I think we ought to leave it to the Legislature to say whether they intended to effect so serious a change, going far beyond any bankruptcy legislation of which I am aware, and to hold that the amendment is confined to preferences.

It is quite out of the question to say that this case falls within the first branch of the section as a transfer to defeat or delay creditors, unless overridden by the words I have referred to. The transfer was not made by the mortgagor with intent to delay creditors, but to secure the co-trustee against loss by reason of his defalcations.

I am of opinion, therefore, that the judgment appealed from is right, and should be affirmed.

Judgment.

BURTON
J.A.

I may add that I quite agree with my brother Osler as to the right of a creditor in the absence of an assignment under the Assignment and Preferences Act to maintain a suit to set aside a preferential conveyance or other transfer declared to be void under the second section of that act.

OSLER J.A. :—

This is an appeal by the plaintiffs from the judgment of MACMAHON, J., at the trial, dismissing an action brought by them as judgment creditors of defendant Wismer to have a mortgage of certain lands made by him to his co-defendant Halter and himself, as executors of one Jantz, declared fraudulent and void as against the plaintiffs, and all other creditors of Wismer.

The mortgage bears date the 18th of May, 1888, and the plaintiffs' judgments were recovered on the 21st of June, and the 6th of July, 1888.

Wismer made no assignment for the general benefit of his creditors, and the defendants are still mortgagees of the property in question.

The learned trial Judge dismissed the action under the erroneous impression, as he has told us, that the property had been sold by the mortgagees, and consequently that the plaintiffs, as creditors, could not follow the proceeds of the sale, the right to do that being confined by the Assignment and Preferences Act, R. S. O., ch. 124, secs. 7, 8, to an assignee for the benefit of creditors, or to a creditor where such an assignee has refused to take the necessary proceedings.

The appeal is resisted by the defendant Wismer (for his co-defendant appears to have taken no part in defending the action) on various grounds.

I may say in the first place we all agree that, when the debtor has not made an assignment there is nothing

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OSLER
J. A.

to prevent a creditor maintaining an action to set aside a preferential conveyance or transfer declared by section two of the Act to be void against creditors. If there is an assignee the action must, by force of section seven, be brought by him, but if not, the right of the creditor remains unaffected. The construction which the defendants ask us to put upon the Act is quite inadmissible, and involves, besides, the extraordinary proposition, that if a debtor only refrains from making an assignment he may prefer any creditor he pleases, because the Act enables no one but an assignee to attack a preferential conveyance.

I think the plaintiffs' judgments against Wismer were sufficiently proved as against both defendants. The originals themselves were produced by the clerk of the Court at the trial, and the plaintiffs' manager proved that the debts for which they were recovered existed prior to the impeached conveyance. There was also abundant evidence, apart from his own admission, of Wismer's insolvency at the date of the mortgage.

The principal question is, whether, under the circumstances, the mortgage is void as a fraudulent preference, or as defeating, delaying, or prejudicing creditors, within the meaning of section 2 of the Act R. S. O., ch. 124, the language of which, so far as it is important here, is as follows: "Every conveyance * * of * * any * * property, real or personal, made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat, delay, or prejudice his creditors, or to give to any one or more of them a preference over his other creditors, or over any one, or more of them, or which has such effect, shall, as against them, be utterly void."

The defendants are co-executors of one John Jantz, and the defendant Wismer applied to his own use upwards of \$1,000 of the moneys of the estate.

In his evidence he said he "gave the mortgage so that the Jantz estate should be paid in full, though he could not pay his other creditors in full. He looked upon this

debt as being different from other debts. He thought the children should have the preference. Halter urged him to give the mortgage. He thought he could do it legally, and had legal advice to that effect. He gave it because he considered the debt of the estate a debt above all other debts—a trust fund,—and because there might be a loss to the estate if he didn't. The mortgage was not made to defraud any of his creditors, or to give a fraudulent preference."

Judgment.

OSLER
J.A.

The defendant Halter said that:

"After he heard that Wismer got into financial difficulties he asked him if he had kept the funds of the estate separate and safe, or if he had put them in the milling business, and that if he had, he should get a way to get them out for the Jantz children. Wismer told him he was ruined, and would like to save the money of the estate that he had used, if he could, and that if he found out afterwards that the mortgage was not legal, he could cancel it."

I agree with Mr. Nesbitt that the transaction was not a preference of one creditor to the other creditors of Wismer, within the meaning of the Act, because neither Halter himself, nor the executors of Jantz, were his creditors, in the strict sense of the word, and the case is therefore outside of the statute.

Several recent decisions of the Court of Appeal in England support this view. The first is *Ex parte Stubbins, Re Wilkinson*, 17 Ch. D. 58, a decision upon section 92 of the Bankruptcy Act of 1869, which avoids, inter alia, every transfer of property, and every payment made to a creditor with a view of giving a preference. Wilkinson, the bankrupt, was one of two co-executors, and had misappropriated money belonging to the estate. Within three months before filing a liquidation petition he sold some goods to his co-executor Gaunt, intending to use the purchase money in making good the funds he had so misapplied. This intention was known to his co-executor, with whose knowledge the purchase money was at once paid by the vendor into a bank to the credit of the executors. It was

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OSLER
J.A.

urged that Gaunt was liable to make good to the trust estate the amount of Wilkinson's defalcations, and was therefore a creditor of Wilkinson to that amount.

It was held that the transaction was neither a fraudulent preference nor a fraudulent transfer of property. James, L. J., said: "It is impossible to bring such a transaction within the doctrine of voluntary preference of a creditor. In order to do that there must be a payment or a transfer of goods by a debtor to a creditor or to somebody in trust for a creditor. Here the creditor was the trust estate if it could be called a creditor at all."

Then there is the case of *Ex parte Taylor—Re Goldsmidt*, 18 Q. B. D. 295, upon section 48 of the Bankruptcy Act, 1883, which enacts that "every conveyance or transfer of property made by any person unable to pay his debts as they become due from his own money in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making the same is adjudged bankrupt within three months after the date of the same, be deemed fraudulent and void as against the trustee in bankruptcy." The bankrupt misappropriated moneys and securities belonging to an estate of which he was one of the trustees. Within a month before he became bankrupt he assigned to Taylor, one of his co-trustees, certain property for the purpose of making good his defalcations. It was held that even if Taylor could be regarded as a creditor, the assignment was not avoided, because it could not be said to have been executed with the view of preferring Taylor, but rather with the view of making good the breach of trust. I do not rest at all upon that ground. But it was also held that the assignment was not a fraudulent preference on the further ground that the relation of debtor and creditor did not exist between the parties, in respect of the trust money which was lost, and which the assignment was given to secure. Lord Esher, M. R., says: "The relation of debtor and creditor did not exist between the parties. The relation was only that of trustee and co-

trustee, honest trustee and defaulting trustee. No action of debt could have been maintained for the sum which was paid, and such a case is not within section 48 at all." Lindley, L.J. : "A cestui que trust is not a creditor of his trustee, nor is a trustee a creditor of his co-trustee. In neither case do the parties stand in the relation of debtor and creditor." Lopes, L. J. : "I do not think that section 48 applies to the state of things which then existed, the relation of debtor and creditor not existing between the bankrupt and Taylor. The transaction amounted to a restitution of trust funds which had been misapplied by the bankrupt. * * The bankrupt might have acted with a view to benefit his cestuis que trust-ent, but they were not his creditors in any sense of the word." See also *Re Mills, Ex parte The Official Receiver*, 58 L. T. 235-871, and *Ex parte Ball, Re Hutchinson*, W. N. 1887, p. 21, in which it is said that leave was given to appeal to the House of Lords. I have not found any further trace of it.

Judgment.

OSLER
J. A.

I am not prepared to say that these cases are of general application to the preference clause of section two of our Act, because I am of opinion that that section goes further than the sections of the English Acts, and avoids a conveyance or transfer of property, whatever may have been the intent or view with which it was given, if the effect of it is to prefer the creditor. If that be not the meaning of the Act, the doctrine of preference, which the Legislature has been struggling to abolish, remains in full force, and the wrongful intent may be rebutted just as hitherto by proof of such circumstances as existed in the cases just cited, and in the one we are now dealing with. But it appears to me that these cases do shew that such a transaction as this cannot be regarded as a preference of one creditor to another for the reason already mentioned, viz., that Halter was not a creditor, nor were Wismer and Halter creditors, of Wismer, in respect of the money misapplied by him. The mortgage therefore cannot be avoided as having been given with intent to prefer, or as having the effect of preferring, one creditor to another.

Judgment.

OSLER
J.A.

The plaintiffs however contend, that even if not invalid as a preference, the mortgage comes within the other branch of the section as a conveyance or transfer made "with intent to defeat, delay, or prejudice creditors *or which has such effect.*" I think it would be difficult to infer such an intent from the evidence. The intent was to secure the trust moneys to the estate, and to prevent the loss from falling upon the cestui que trust. But what of its effect upon creditors? The Act now provides that every conveyance made by an insolvent person with intent to defeat, delay, &c., his creditors, "or which has such effect," shall be void. What is the force of these latter words? They cannot be rejected or treated as surplusage, and as a matter of construction they apply to the whole of the antecedent part of the section, embracing as well conveyances made with intent to defeat, &c., as those made with intent to prefer only. In the Act as it formerly stood, the intent, as Wilson, C. J., pointed out in *Gottwalls v. Mulholland*, 15 C. P. 62, was the all-important element. "No doubt," he says, "the insolvency of the debtor is an enquirable fact not only under our statute but under the statute of Elizabeth, for, if he be not insolvent, and the transaction does not necessarily make him so, his sales and transfers are all quite valid; the statute does not apply to him. But granting the insolvency of the debtor, all his sales or conveyances of his property are not invalid merely because he is an insolvent; it is only such of them as are made 'with intent to defeat or delay creditors,' or 'to give a preference.'" If in the new section the word "or" should be read "and," the wrongful intent will still be the all-important element, and must exist and be found before the conveyance or transfer can be set aside, and if so, it may still be disproved in many ways as e.g. by evidence of pressure, or of such facts as have been proved in this case, shewing that the intent was not to defeat, or to prefer, but something quite different.

In *Fowler v. Padget*, 7 T. R. 509, this construction was placed on the Bankruptcy Act of 1 Jac. 1 ch. 15, which declared that certain acts done "to the intent, or whereby

creditors may be defeated or delayed," should be acts of bankruptcy ; and it was held that the intent to defeat and delay, and the actual defeat or delay of the creditor must concur, to constitute the act of bankruptcy. But, besides that the reasoning on which that decision proceeded does not appear to me to apply very closely to our Act, I think the intention of the Legislature was to avoid any conveyance, transfer, &c., by an insolvent (with the exceptions specially mentioned in section 3) which has the effect of defeating or preferring creditors, whatever may have been the intent with which he made it. The object which the Legislature seems to have had in view was to avoid the sales etc., of an insolvent, just because he is an insolvent, so that a person in that situation should be, as it were, forced to make an assignment for the benefit of his creditors generally, by means of which his whole estate should be distributed under the elaborate provisions of the Act. In trying to arrive at the meaning of the section we cannot disregard the course of legislation. First, the original section (as it may be called), R. S. O., (1877) ch. 118, sec. 2, was amended by 47 Vic. ch. 10, sec. 3, by the insertion of the words "whereby such one or more of his creditors would obtain a preference," &c. This was held ineffectual to avoid a preferential security obtained by pressure, so that the amendment in fact made no alteration in the law. Then came 48 Vic. ch. 26, now R. S. O. ch. 124, the preamble of which recites that "great difficulty is experienced in determining cases arising under the present law relating to the transfer of property by persons in insolvent circumstances." Section two and its amendment are repealed altogether, "and the following sections are substituted therefor." These substituted sections comprise not only a new section two, in the form in which we now have it, but a series of sections providing for the distribution of the insolvent's estate under the assignment, which the Act, by invalidating all conveyances or transfers made with intent to defeat or prefer, or which have the effect of defeating or preferring, creditors, except those saved by section three,

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OSLER
J.A.

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J. A.

practically compels the insolvent to make if he desires to avoid having his property administered by the sheriff under the Creditors' Relief Act.

Upon the whole it appears to me that the plain language of the Act calls for the construction I have indicated; for conveyances by an insolvent which have the effect of defeating his creditors seem to be in express terms avoided equally with those which are made with that intent. And therefore as in this case the effect of the conveyance necessarily is to defeat, delay, or prejudice the creditors of the mortgagor quite as much as if it was made with that intent, the judgment appealed from is in my opinion wrong, and the appeal should be allowed.

I refer to *River Stave Co. v. Sill*, 12 O. R. 557; *Building and Loan Association v. Palmer*, 12 O. R. 1; *Rae v. McDonald*, 13 O. R. 352; *Kennedy v. Freeman*, 15 A. R. 216, at pp. 229, 231.

MACLENNAN, J. A., concurred with HAGARTY, C. J. O.

Appeal dismissed with costs, OSLER, J. A., dissenting.

LINTON V. THE IMPERIAL HOTEL COMPANY.

Landlord and tenant—Lease with proviso for determination in case of assignment for the benefit of creditors—Right reserved to distrain after such assignment—Amount for which distress may be made—50 Vic. ch. 23, (O.)—(R. S. O. ch. 143.)

B., by lease dated 28th of November, 1887, was lessee for five years from the 1st of February, 1888, of certain premises at a yearly rental of \$370, payable quarterly in advance, the lease containing a provision that if the lessee should make any assignment for the benefit of his creditors, the then current year's rent should immediately become due and payable, and might be distrained for, but that in other respects the term should immediately become forfeited and at an end. It was also agreed that the Act, 50 Vic. ch. 23 (O.), should not apply to the lease. B. paid \$100 on account of rent on the 7th July, 1888, and on the 16th July, 1888, made an assignment to the plaintiff for the benefit of his creditors, and the plaintiff went into possession of the premises, and remained in possession until the 1st of September, 1888. On the 24th July, 1888, the defendants distrained for, and were paid by the plaintiff as assignee, \$270, the balance of the current year's rent.

Held, that the lease did not become void because of the assignment, but only voidable; that the right to claim the accelerated rent depended, not upon the lessors' election to forfeit the term, but upon the fact of the lessee having made an assignment for the benefits of his creditors; that the clause was divisible; and that the lessors might distrain for the rent as they had not elected to forfeit the term, the distress itself not being an election to forfeit.

Held, also, that the goods in the possession of the assignee were not *in custodia legis* so as to protect them from distress.

The position and liability of such an assignee on becoming assignee of the term, considered.

Wylde v. Clarkson, 12 O. R. 589, explained; *Atkinson v. Baker*, 14 A. R. 409, and *Griffith v. Brown*, 21 C. P. 12, considered.

Judgment of the County Court of Wentworth varied.

THIS was an appeal from the judgment of His Honour Judge Muir, Junior Judge of the County Court of the County of Wentworth, upon the following case stated between the parties:

“The defendants, the Imperial Hotel Company, by indenture of lease bearing date the 28th day of November, 1887, demised and leased certain store premises in Galt to one John Braid for the term of five years, to be computed from the 1st day of February, 1888, at the yearly rental of \$370.00, payable quarterly in advance, the first of such payments becoming due on the 1st February, 1888. The said lease, among other provisions, contained the following:

Statement. " Provided if the term hereby demised or the goods on the demised premises shall at any time be seized or taken in execution or in attachment by any creditor of the said lessee, or if the said lessee shall make any assignment for the benefit of his creditors, or, being insolvent, shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors, or in case a default be made by the said lessee in any of the covenants or conditions herein, the then current year's rent shall immediately become due and payable, and may be distrained for, but in other respects the said term shall immediately become forfeited and at an end, and the said lessors shall thereupon be entitled into and upon the said premises, or any part thereof, in the name of the whole, to re-enter and the same to have again, repossess, and enjoy, as if these presents had not been executed."

" And it is hereby declared that the provisions of the Statute of Ontario, 50 Vic. ch. 23, intituled 'An Act respecting Distress for Rent and Taxes,' shall not apply to this lease."

The said John Braid, on the 7th of July, 1888, paid \$100 on account of the rent payable under said lease, but made no other payment in respect thereof.

On the 16th day of July, 1888, the said John Braid made an assignment for the benefit of his creditors to the plaintiff in pursuance of the Revised Statutes of Ontario, ch. 124, and the defendants, the Imperial Hotel Company, in accordance with the said proviso, on the 24th day of July, 1888, distrained by their bailiff, the defendant, John Kirkpatrick, for the sum of \$270 for rent under the said lease upon certain goods and chattels comprised in the said assignment, and then in the possession of the plaintiff as such assignee, the goods so seized being then in and on the demised premises.

The plaintiff, with the consent of the defendants, the Imperial Hotel Company, retained possession of the demised premises up to the 1st day of September, 1888, when he gave up same to the defendants, the Imperial Hotel Company and the said premises are now vacant.

The question for the opinion of the Court is, whether the defendants, the Imperial Hotel Company, on the 24th day of July, 1888, were entitled to distrain on the said goods and chattels for any sum for rent under the said lease, and if so, then for what amount?

And it is agreed between the parties to this action : [Statement.

1st. That if the judgment of the Court should be that the defendants, the Imperial Hotel Company, were on the 24th day of July, 1888, entitled to distrain on the said goods and chattels for the sum of \$270 for rent under the said lease, then the defendants shall be entitled to judgment against the plaintiff for the costs of this action.

2nd. That if, on the other hand, the judgment of the Court should be that the defendants, the Imperial Hotel Company, were not so entitled to distrain, the plaintiff shall be entitled to judgment against the defendants for the sum of \$185, or, as the case may be, for such other lesser sum as shall represent the difference between the said sum of \$270, and the amount for which the Court may decide the said defendants, the Imperial Hotel Company, were entitled to distrain, as aforesaid, together with the costs of the action."

The learned Judge held that the defendants were, on the 24th of July, 1888, entitled to distrain for rent, but only for rent up the 1st of September, 1888; and he gave judgment in favour of the plaintiff for the sum of \$154.17, being the balance of the current year's rent, less the amount calculated *de die in diem* from the 1st February to the 1st September, 1888.

From this judgment both parties appealed, and the appeals came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 21st of March, 1889.

W. Nesbitt, and W. M. Douglas, for the plaintiff. The sum of \$85 being the only "arrears" due at the date of the assignment, the landlord's 'right to distrain,' if any such right existed, or, in other words, his 'preferential lien' was restricted to such arrears by virtue of the R. S. O. ch. 143, sec. 28, sub-sec. 4; *Griffith v. Brown*, 21 C. P. 12; *Mason v. Hamilton*, 22 C. P. 190-411; *Re Hoskins*, 1 A. R. 379. By virtue of the assignment and the taking of possession thereunder by the assignee, the property

Argument. was placed *in custodia legis*, and the right to distrain was therefore taken away : *Re McCracken*, 4 A. R. 486 ; *Wyld v. Clarkson*, 12 O. R. 589. The act of distraining for the whole year's rent was an unequivocal act indicating an intention to forfeit the lease under the proviso, and therefore the landlord lost his right to distrain : *Baker v. Atkinson*, 11 O. R. 735. The provision that the right to distrain shall still exist, notwithstanding the forfeiture of the term, cannot avail, as by reason of the forfeiture the relation of landlord and tenant ceased to exist, and such provision could therefore only at best be construed as a mere personal license to take the goods of the tenant while such goods remained his property, and could not prevail against his transferee. Further, the attempt to create a lien on the goods in any way must also be considered as an evasion of the Chattel Mortgage Act : *Royal Canadian Bank v. Kelly*, 20 C. P. 519 ; 22 C. P. 279 ; *La Vassaire v. Heron*, 45 U. C. R. 7 ; *Trust and Loan Co. v. Laurason*, 6 A. R. 286 ; 10 S. C. R. 679. The accelerating proviso is within R. S. O. ch. 124, sec. 2, and is by virtue of that Act fraudulent and void as against creditors ; *Baker v. Atkinson*, 11 O. R. 735 ; *Re Hoskins*, 1 A. R. 379.

E. Martin, Q. C., for the defendants. The defendants having been lawfully entitled to distrain for the full amount at the time of making the actual distress, the rent being then in arrear owing to default in payment of rent accruing before that day, they could not be deprived of this sum or forced to refund it by anything which had subsequently occurred. Section 28, R. S. O. ch. 143, does not apply, but if it does, then sub-section 1 expressly authorizes the landlord to distrain as against the assignee for creditors. The Act was intended to secure one full year's rent to the landlord as a compensation to him for loss which might accrue by the premises being thrown on his hands, or for loss in refitting the premises for other purposes, or the like, a year's rent being considered a reasonable sum : *Graham v. Lang*, 10 O. R. 248 ; *Baker v. Atkinson*, 11 O. R. 735, at p. 755. The apportionment clause, section 2 of R. S. O. ch.

143, has no application to this case. The landlord's right of distress is not affected by the assignment, and the assigned goods are not deemed *in custodia legis*: *Eacrett v. Kent*, 15 O. R. 9. Argument.

May 14th, 1889. HAGARTY C. J. O.:—

I do not think that any question as to apportionment of rent arises in this case.

In either of several expressed contingencies, one being if the lessee assign for the benefit of creditors; another, if default be made in any of the covenants, the then current year's rent shall become due and payable and may be distrained for.

Here default was made in the quarterly payments of rent in advance, as also by the assignment, and the landlord then distrained. He can defend his right to distrain on any of these grounds.

The learned Judge below, says: "There is nothing here to shew that the landlord elected to declare the term to be at an end. We cannot conclude from the fact of a levy of distress, that his object was anything more than a determination on his part to call up the current year's rent,—claiming rent is one thing, claiming possession is quite another."

We agree in this view of the case. For myself, I gave much attention to this point in this Court in *Baker v. Atkinson*, 14 A. R. 409. The case did not turn on it, but I adhere to the view there expressed.

The parties have specially contracted themselves out of the operation of the Landlord and Tenant Act, 50 Vic. ch. 23, (O.) which had just come into operation.

I do not see why they had not the right so to do.

But even if section 28, sub-sec. 4, be in force, I still think the defendants had the right to distrain as they did. The section merely restricts the claim of the landlord to arrears of rent due during the period of one year last previous to the execution of the assignment.

Judgment.
HAGARTY
C.J.O.

Nothing more was claimed here than the rent of that year, the payment of which was accelerated under the contract of the parties by the happening of any one of the contingencies provided against.

I consider that the clause was aimed against permitting a landlord to claim for rent accruing beyond the period of the year preceding the assignment.

In a case like the present it is not easy to see that the assignee would not be bound by the contract of his assignor, or would have any higher right than the assignor under the power conferred on him of suing for the rescission of agreements, &c., made or entered into in fraud of creditors.

We confine our judgment to the decision of the question submitted—to the mere point whether the landlords had the right to distrain for the unpaid balance of the current year's rent, and our opinion is in their favour thereon.

OSLER J. A. :—

The learned Judge answered the first question ; whether the defendants were, on the 24th July, 1888, entitled to distrain under the lease ? “in the affirmative.” The second question, as to the amount they were entitled to distrain for, he answered by saying “the plaintiff is entitled to recover from the defendants the sum of \$154.17, being the balance of the current year's rent, less the full amount of rent calculated *de die in diem* from the 1st February to the 1st September, 1888.”

From this decision both parties appeal ; the plaintiff, the assignee, contending that of the \$270 distrained for, he is entitled to recover back \$185, on the ground that the defendants, if entitled to distrain at all, had no right to do so for more than \$85, the balance due upon the first two quarters' rent ; the defendants, on the other hand, insisting that under the clause in the lease set forth in the case, the whole of the current year's rent became due and payable, and was distrainable by reason of default having been

made in the covenant for payment of rent; and also in consequence of the assignment to the plaintiff.

Judgment.

OSLER
J. A.

It is clear that the learned Judge has inadvertently gone outside the special case, which expressly confines the questions for decision to the rights of the parties on the 24th July, 1888, when the distress was made, viz.: whether the defendants were then entitled to distrain, and if so for what sum. The amount cannot properly be ascertained with reference to the time when the assignee gave up possession. If entitled to distrain at all it must have been for either \$85 the balance of the first two quarters' rent, or else for \$270 the balance of the whole year's rent under the accelerating clause. The apportionment sections of the Landlord and Tenant Act have no bearing on the case.

What then were the rights of the lessor under the provisions of the lease? In my opinion whether the rent is to be regarded as accelerated by breach of the covenant to pay the quarterly gales, or by the assignment, the right to distrain must equally depend upon the continued existence of the term. For where the term has been determined in consequence of a forfeiture and not by effluxion of time, it would seem that the statute of Anne is inapplicable: *Grimwood v. Moss*, L. R. 7 C. P. 360; and if the term is gone, the landlord being unable to distrain as at common law, or by virtue of the statute, the power of distress specially mentioned in the lease can only be regarded as a personal license to be executed on the tenant's own goods and not upon property which has passed to the assignee.

We find two things stipulated for in case the lessee makes an assignment for the benefit of his creditors; (1) the then current year's rent shall immediately become due and payable, and may be distrained for; (2) but in other respects the said term shall immediately become forfeited and at an end, and the lessees shall be entitled to re-enter, &c.

It appears to me that this clause has a double operation. The rent is accelerated, and the lessee has the right to re-enter and determine the lease. It is not necessary to

Judgment.

OSLER
J.A.

decide that he loses his option to take advantage of the forfeiture by accepting, or distraining for, the accelerated rent. It is rent which becomes due and payable by the very act which occasions the forfeiture, and there may be reasons why such receipt should not operate as a waiver, but I think that the fact of the lessee so receiving or distraining for it, is no evidence that he has elected to take advantage of the forfeiture, and to put an end to the term. So far as any inference is to be drawn from the fact it is in favour of an election to continue the lease. The language of the clause supports the construction that the distress does not involve an election to forfeit. The rent may be distrained for, "but in other respects the term shall become forfeited," as if the lessor's right in that respect was to arise after the recovery of the rent, or independently of it.

It is much as if the lessee's covenant was, in case of an assignment, to deliver a horse or pay a sum of money, not as the rent, coupled with a forfeiture clause. The horse might be claimed or the money demanded without being treated as an election to forfeit the term. In a recent case in the Privy Council, *Davenport v. The Queen*, 3 App. Cas. 115, at p. 128, the settled rule of construction of a proviso for forfeiture, is thus referred to: "In a long series of decisions the courts have construed clauses of forfeiture in leases declaring in terms, however clear and strong, that they shall be void on breach of conditions by the lessees, to mean that they are voidable only at the option of the lessors. * * * The scope and purpose of an enactment may be so opposed to this rule of construction that it ought not to prevail, but the intention to exclude it should be clearly established."

With great respect for those learned Judges who have expressed a different view, I am of an opinion that the right to claim the accelerated rent depends, not upon the lessor's election to forfeit the term, but upon the fact of the lessee having made an assignment for the benefit of his creditors. This was the opinion of the late Chief

Justice Sir Matthew Cameron, in *Baker v. Atkinson*, 11 O. R. 735, and I think of Chief Justice Sir Adam Wilson, in *Graham v. Lang*, 10 O. R. 248, at p. 252, of the meaning of very similar clauses in the instruments in question in those cases.

Judgment.

OSLER
J.A.

I think the clause is divisible, and the lessor may distress for the rent so long as he has not elected to forfeit the term. If he elects to do that, he loses his remedy by distress, and is perforce driven to recover the rent in some other manner.

The decision in *Young v. Smith*, 29 C. P. 109, accords with my view of the rights of the landlord in this case. That of *Griffith v. Brown*, 21 C. P. 12, so far as it does not turn upon the provisions of the Insolvent Act, I am unable to assent to as laying down the proper rule for the construction of such a clause as that now in question. If the term was not *ipso facto* avoided by the assignment it passed to the assignee, who, as the case states, entered on the demised premises, and remained in possession thereof, and thereby, so far as an election to accept was necessary, elected to accept the lease and term : *Magee v. Rankin*, 29 U. C. R. 257 ; *Kerr v. Hastings*, 25 C. P. 429, and he was in possession thereof, and of the goods distrained, at the time of the distress.

I am unable to distinguish the position of such an assignee from that of any other assignee of the term under a voluntary assignment. Whether he can discharge himself from his liability as assignee, and cancel the lease, as an assignee under the Insolvent Act could have done, may be questioned. His position in many respects is not analogous, and, with one exception, none of the provisions which that Act contained, regulating the rights of the assignee and the landlord, are made applicable to the case of a voluntary assignee for the benefit of creditors. I see nothing in the "Landlord and Tenant Act," or the "Assignment and Preferences Act," which prevents the lessor from exercising his common law right of distress. He is not deprived of it by section 28, subsection 4, of the former Act, which

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merely restricts his preferential lien, or the amount for which he may distrain.

That provision was found in the Insolvent Act, but the section of that Act which was held to deprive the landlord of his right of distress, was section 125, which declared that all remedies for enforcing any claim for a debt, privilege, etc., upon or against property in the hands of the assignee, were to be obtained by application to the Court, and not by seizure, &c. : *Re McCracken*, 4 A. R. 486, at p. 493, per Moss, C. J.

Nor am I aware of any authority for saying that property on the demised premises in the possession of such an assignee, is *in custodia legis* so as to be protected from distress, that being a right which has not been expressly taken away. We were referred to the case of *Wyld v. Clarkson*, 12 O. R. 589, in which the estate in the hands of the assignee is spoken of as being "*in custodia legis*, protected from judgments and executions, and available for the creditors in due course of law."

But the learned Chancellor's observation was not directed to a case of this kind. He was merely pointing out that the estate was in the hands of a trustee for creditors, in such a way as to make the right to rank upon it, a security which, under the circumstances, the holder of such right was bound to value under section 18 of the Act. Where such a trustee is the assignee of a lease, he is subject to the exercise of the lessor's ordinary remedies, and the case referred to is no decision to the contrary: *Eacrett v. Kent*, 15 O. R. 9.

The answer to the 1st question submitted, therefore, must be that the defendants on the 24th July, 1888, were entitled to distrain for rent under the lease.

The second question as to the amount they were entitled to distrain for, presents no difficulty.

Section 28, sub-sec. 4, of the Landlord and Tenant Act, restricts the landlord to the arrears of rent due during the period of one year last previous to the date of the assignment, and from thence so long as the assignee shall retain

the premises leased. In *Re Hoskins*, 1 A. R. 379, at p. 383, it was held in the case of the corresponding section of the Insolvent Act that this meant, not a year's rent, but whatever rent had become due during the year previous to the assignment. If the balance of the current year's rent is to be regarded, as perhaps it may be, as having become due and in arrear by reason of the nonpayment of the quarterly gales, then it was rent which had become due and in arrear within the specified time previous to the assignment, and was distrainable as such, and on the other hand if it only became due by virtue of the assignment it was recoverable as rent due and in arrear in the time of the assignee under the latter clause of the section. Either way, therefore, the defendants had the right to distrain for the whole balance of the current year's rent, and the second question submitted should have been answered accordingly.

Judgment.

OSLER
J.A.

The result is, that the appeal must be dismissed, and the cross-appeal allowed, with the usual consequences.

BURTON and MACLENNAN, JJ A., concurred.

*Appeal dismissed with costs, and
cross-appeal allowed with costs.*

LEMAY V. MCRÆ ET AL.

Arbitration and award—Motion to set aside award—Admissions of arbitrator as to the grounds upon which he proceeded—Draft award setting out grounds—Improper reception of evidence.

Held, affirming the judgment of ARMOUR, C. J., that where the action and all matters of account and counter-claim therein, and all matters in difference between the parties were by consent referred to the arbitration and final end and determination of a named person and no provision was made for an appeal, his award, valid on its face, could not be attacked because of alleged improper reception of evidence by him, or because of alleged errors in the principle of computation upon which he proceeded; the evidence having been received with reference to matters in difference between the parties and within the jurisdiction of the arbitrator, and the principle of computation being disclosed in a draft award, not delivered with, nor forming any part of the formal award, and in conversations, after the making of the award, between the arbitrator and one of the solicitors for the attacking party, the arbitrator himself not admitting that he had made any mistake, and not assisting the party complaining of the award to apply to the Court to set it right.

East and West India Dock Co. v. Kirk, 12 App. Cas. 738, considered.

Statement.

THIS was an appeal from the judgment of ARMOUR, C. J., dismissing with costs a motion by the defendants to set aside an award.

The action was brought for work and labour done, and materials supplied, by the plaintiff to the defendants in the construction of certain bridge work east of Port Arthur on the line of the Canadian Pacific Railway Company. The defendants alleged that the work was done under certain contracts in writing with the firm of Lemay & Son, who had been paid in full the contract prices, and also the amount due them for certain extra work done by them; that the plaintiff was really suing as the representative of that firm, and that they were entitled to a set-off against that firm for goods furnished and moneys paid to them, and they counter-claimed against the plaintiff, and Lemay & Son, for goods and materials furnished to, and work and labour done by them for, Lemay & Son and the plaintiff.

The defendants were contractors with the Canadian Pacific Railway Company for the construction of certain works on their line of railway, and one of the specifications of their contract provided that timber of every kind

(with certain specified exceptions) in structures, framed or Statement erected, drift bolted and spiked, should be paid for at the rate of so much per thousand feet board measure. Lemay & Son sub-contracted with the defendants for the performance of part of the works undertaken by them by four several contracts all of which provided for payment for bridge work and trestle work at so much per thousand feet board measure.

Differences arose between the defendants and the railway company, as well as between Lemay & Son and the defendants, as to the timber furnished under the contracts, not merely as to the quantity supplied, but also as to the mode of measurement, and the meaning of the term "board measure," the defendants claiming as against the company, and Lemay & Son claiming in the same way, as against the defendants, that it bore a different meaning from that which the company insisted on. It was also contended that the measurements had been made and accepted by the company's engineer, and returned to the company and accepted by them, upon a different mode from that provided for by the contracts, and upon the basis of the mode so adopted by the engineer, it was contended that the defendants were entitled to be paid by the company, and Lemay & Son by the defendants.

Upon the action coming on for trial an order was made by consent in the following form, Lemay & Son being treated as the plaintiffs:

" This action having, on the 12th day of July, 1887, come on for trial before the Honorable Mr. Justice Armour, at the sittings of this Court for the trial of actions, held at Port Arthur on the said date. Upon hearing the parties by their counsel, and all parties consenting thereto, it is ordered :

1. That this action and all matters of account and counter-claim herein, and all matters in difference between the parties hereto, be referred to the arbitration award and final end and determination of George H. Macdonell, of Port Arthur, who is hereby empowered to direct that judg-

Statement.

ment shall be entered for the plaintiffs or defendants, or to order that the action be dismissed, or to make such other order or award as to him seems proper in respect to all the matters or any of the matters hereby referred to him.

2. The said arbitrator shall have all the powers of a Judge at Nisi Prius as to amending pleadings and particulars, and as to certifying for costs and otherwise.

3. That the costs of this action and counter-claim, and of the reference and award, and the fees of the arbitrator, shall be in the discretion of the said arbitrator as to who shall pay the same.

4. The said arbitrator shall make his award on or before the fifteenth day of October next ensuing the date of this order, with liberty to the said arbitrator under his hand in writing to enlarge the time for making his said award.

5. That the parties hereto shall on their respective parts in all things stand to, abide by, obey, perform, and fulfil the said award of the said arbitrator to be made and published.

6. The sittings of the arbitration for the determination of the questions hereby referred shall be held at the town of Port Arthur, in the District of Thunder Bay, to begin not earlier than the fifteenth day of September, 1887."

The arbitrator made his award in favour of the plaintiffs, finding that there was due to them by the defendants the sum of \$9,900.52.

A motion was made by the defendants to set aside the award, the principal grounds of objection being (1) that the arbitrator illegally, and in excess of his jurisdiction, received evidence of a verbal contract or understanding, or verbal contracts or understandings, between the plaintiffs and the defendants varying the written contracts between them, relating to and covering the same subject matter, and illegally and without jurisdiction upon such evidence awarded payment to the plaintiffs for the timber supplied by them to the defendants, not by "board measure" as required by the said written contracts, and as the defendants received payment therefor from the Canadian Pacific Rail-

way, for whom the said timber was required and supplied ^{Statement.} to the defendants, as the plaintiffs well knew, but upon another and different basis and system of measurements alleged to have been substituted therefor by the said verbal contract or understanding, or verbal contracts or understandings; and (2) that the award was contrary to law and evidence and clearly founded upon a mistake and misapprehension of law and upon a mistake in the mode of allowing payment to the plaintiffs and making deductions therefrom as appeared by the affidavits and the draft of the award.

The defendants put in in support of their motion, among other affidavits, an affidavit of one of the solicitors for the defendants, proving certain admissions made by the arbitrator in conversations with the solicitor after the award had been made and published, as to the principle upon which he had proceeded, and they also put in a draft award in which the principle upon which the calculations were made was set out. The formal award had not been issued in the same form as the draft award, and the latter was not delivered with, was not referred to in, and did not form any part of, the former.

The defendants' motion was dismissed with costs, see 16 O. R. 307, and an appeal by them from the order dismissing it, came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 22nd of March, 1889.

Robinson, Q.C., and A. Ferguson, for the appellants. The award should be set aside as the arbitrator has wrongly admitted evidence varying the contracts, and has clearly proceeded upon a wrong principle in his computation. It is not an objection that the erroneous principle does not appear on the face of award, because it has been clearly shewn by the admissions of the arbitrator, and by the draft award prepared by him: *East and West India Dock Co. v. Kirk*, 12 App. Cas. 738; *Re Dare Valley R. W. Co.*, L. R. 6 Eq. 429; *Kent v. Elstob*, 3 East. 18; *Jones v. Corry*, 7

Argument. Dowl. 299 ; Russell on Awards, 6th ed., p. 315 ; Redmond on Awards, 2nd ed., p. 256.

Delamere, and *F. H. Keefer*, for the respondents. The award is good on its face, and cannot be set aside where no fraud or misconduct is shewn. The draft award forms no part of the formal award, and was not delivered with it, and cannot be looked at, nor can any weight be given to the alleged admissions. The award cannot now be objected to on the ground of wrongful admission of evidence, since the appellants, after the alleged improper reception of evidence, allowed the arbitrator to go on, taking the risk of what his award would be : *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418 ; *Hodgkinson v. Fernie*, 3 C. B. N. S. 189 ; *Moseley v. Simpson*, L. R. 16 Eq. 226 ; *Forwood v. Watney*, 49 L. J. Q. B. 447 ; Russell on Awards, 6th ed., pp. 484, 683.

Robinson, in reply.

May 14th, 1889. The judgment of the Court was delivered by

OSLER, J. A. :—

Taking this case as it has been presented to us, I think the judgment of Chief Justice Armour is right. I was of that opinion at the conclusion of the argument, and a subsequent examination of authorities confirms it.

The reference is a voluntary reference, a submission to arbitration by agreement within the statute of William IV.

It is framed in the widest possible terms, being a reference of "the action and all matters of account and counter-claim therein, and all matters in difference between the parties." There is no right of appeal : the award is good on its face, and if it is to be set aside, it must be upon some ground to which parties are confined by law in attacking awards made under voluntary submissions.

It appears to me impossible to say, having regard to the terms of the reference, that the arbitrator has exceeded the

jurisdiction conferred upon him, and of misconduct in any other sense of the term there is not the slightest evidence, or indeed complaint. We can see that the disputes and differences in respect of which he has taken evidence, and upon which he has awarded, were disputes and differences existing at the commencement of the action. He may have improperly admitted evidence to control, or alter, or vary the written contract between the parties, but the reference was not as in the case of *Tully v. Chamberlain*, 31 U. C. R. 299, limited exactly to the rights of the parties under the contracts themselves. He may have made other mistakes of law and fact as to matters within his authority; but if he has made no mistake as to the extent of the jurisdiction conferred upon him, the Court cannot set aside the award, unless it can be shewn that there was misconduct, or some other equitable ground for interference is made out: *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 5 Ex. 221, at p. 232; *Hodgkinson v. Fernie*, 3 C. B. N. S. 189, at p. 202; *Faviell v. Eastern Counties R. W. Co.*, 2 Ex. 344; *Carveth v. Fortune*, 12 C. P. 504; *Thorburn v. Barnes*, L. R. 2 C. P. 384.

A strong case against the defendants' contention is *Re The Hohenzollern Locomotive Co. and London Contract Corporation*, 54 L. T. 596.

There by the terms of their contract the purchasers were bound to pay for the locomotives delivered to them, upon the certificate of their engineer that they were in perfect working order.

Another clause of the contract provided that all disputes were to be settled by arbitration. Engines and boilers were delivered at the place specified in the contract, but the defendants' engineer refused to certify. Thereupon the plaintiffs proceeded under the arbitration clause, and the umpire made an award in their favour, notwithstanding the absence of the certificate. The Court of Appeal held that he had not exceeded his jurisdiction; that "all disputes" meant all disputes that might arise between the parties in consequence of the contract being entered into;

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OSLER
J.A.

Judgment.

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that a dispute as to the construction of the contract, was within the clause. One party was claiming money because the engines had been delivered, while the other alleged that it was not payable because the certificate of the engineer had not been given. "That," the Court say, "was a dispute within the clause, which the arbitrator had power to decide. It is not material for us to consider whether he was right or wrong."

In support of the second objection it was urged that the improper conduct and mistakes of the arbitrator in the alleged improper reception of evidence and construction of the contracts and modes of measurement adopted, as well as an alleged error in deduction of a percentage in favour of the defendants, appeared by a draft of the award which he had handed to the defendants' solicitor sometime after the making of the award, and by admissions made by him in conversations with the solicitor in explaining, at his request, how the amount had been arrived at.

The answer to these objections is supplied by the cases of *Hodgkinson v. Fernie*, 3 C. B. N. S. 189, in the passage quoted by the learned Chief Justice from the judgment of Williams, J.; *Lockwood v. Smith*, 10 W. R. 628; *Walton v. The Swanage Pier Co.*, 10 W. R. 629; *Dinn v. Blake*, L. R. 10 C. P. 388; *Flynn v. Robertson*, L. R. 4 C. P. 324.

If there be errors in the award they do not appear on the face of the award; nor in any letter or other document accompanying the award, or forming part of it; and the arbitrator does not admit that he has made a mistake, and assist the party complaining of the award in applying to the Court to set it right. To consider this at length would be merely to repeat what has already been said by the learned Chief Justice, and to cite other authorities in support of the well-established rule.

Much reliance was placed upon the recent case of *East and West India Dock Co. v. Kirk*, 12 App. Cas. 738, and it was urged that the stringency of the rule against interfering with awards had in some way been relaxed by that

decision. I do not so regard it. The motion was to revoke the submission on the ground that the arbitrator was about to go wrong in law inasmuch as if he admitted certain evidence he would be exceeding his jurisdiction.

Judgment.

OSLER
J.A.

The Court below thought he would not be exceeding his jurisdiction, and refused to interfere, but the House of Lords, without deciding that question, considering all the circumstances of the case, and we may suppose influenced by the enormous magnitude of the interests at stake, ordered that the submission to arbitration, or rather the appointment of the arbitrator, should be revoked unless the opposite party would consent that certain questions should be raised and stated in such a way that the opinion of the Court might, if necessary, be obtained thereon.

As Denman, J., remarks in a recent case, *James v. James*, 5 Times L. R. 383,* the decision amounts merely to this, that the Court had a discretion to revoke the submission, even though the arbitrator was acting within his jurisdiction. I think the proper inference to be drawn from the case is, that the ordinary rule is to be upheld; and that if the parties see that the arbitrator is likely to go wrong in point of law, and will not consent to state a special case, they ought not to wait until he has made his award, but should move at once to revoke the submission, a course which has more than once been pointed out as the correct one, and acted upon in our own Courts; *Carveth v. Fortune*, 12 C. P. 504; *Ross v. Corporation of Bruce*, 21 C. P. 548, at p. 561.

Until the award has been made the Court (speaking of such submissions as we are here concerned with) has a discretion to give leave to revoke. When the arbitrator has become *functus officio*, other considerations prevail.

On the whole this case seems to me to be well within the authorities which restrain us from interfering with the award, and if a real injustice has been suffered by the defendants, as to which I refrain from expressing an opinion. I can but commend to their attention, and that of others

* Since reported, 22 Q. B. D. 669.

Judgment.

OSLER
J.A.

who may be disposed to submit important interests to the arbitration of a layman, the pertinent observations of Lord Esher, in the case above cited from 54 L. T. 596.

Appeal dismissed with costs.

CONNOR V. MIDDAGH.

HILL V. MIDDAGH ET AL.

Municipal corporations—By-law to open road—Trespass—Necessity for quashing by-law before bringing action—R. S. O., ch. 184, sec. 338—Tree Planting Act—R. S. O., ch. 201.

A municipal council passed a by-law to open a road in a certain defined course, and by a subsequent by-law appointed the defendant M. a commissioner to remove all obstructions from the highway so defined. M. cut down some trees of the plaintiffs and removed these and portions of fences. Actions of trespass were brought against M. and the council, but the by-laws had not been quashed.

Held, that the road defined in the by-law was the true road, and could properly be opened as therein defined.

Held, also, (BURTON, J.A., doubting, but not desiring to express a judicial opinion,) that whether the road defined in the by-law was the true road or not, and whether therefore a trespass was committed or not, the by-laws being under certain conditions and requirements within the general competence of the council, and not being quashed, afforded a complete defence to the actions.

Observations on the construction of the "Tree Planting Act."
Judgments of the Queen's Bench Division reversed.

Statement.

THESE were appeals from judgments of the Queen's Bench Division.

The plaintiff in the first case was a farmer residing in the township of Williamsburgh; and brought this action in October, 1884, to recover damages for trespass alleged to have been committed by the defendant, who claimed to act under the authority and by the direction of the Municipal Corporation of the united counties of Stormont, Dundas, and Glengarry, the trespass complained of having been committed by the defendant in opening a road pursuant to a by-law of the corporation.

The case was tried at the Cornwall Assizes, on the 14th of November, 1885, before ARMOUR, J., who, on the 26th of January, 1886, delivered judgment in favour of the plaintiff, assessing damages at \$500, and on the 11th of September, 1886, this judgment was affirmed by the Divisional Court. Statement.

The plaintiff in the second case, who was also a farmer residing in the township of Williamsburgh, brought his action in January, 1886, against both Middagh and the corporation to recover damages for alleged trespass committed in opening the same road.

The case was tried at the Cornwall Assizes, on the 29th of October, 1886, before ARMOUR, J., the evidence in the former case being put in by consent, and further evidence being taken.

On the 10th of May, 1887, judgment was delivered in favour of the plaintiff, and damages were assessed at \$400, and on the 8th of September, 1887, this judgment was affirmed by the Divisional Court.

The defendants appealed from both judgments, and the appeals were argued together before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 8th, 11th, 12th, and 13th of March, 1889.

The facts were very complicated, but for the purpose of this report the following brief outline is sufficient:

The main question involved was, as to the true location of the allowance for road between the townships of Winchester and Williamsburg. The townships were laid out in 1794, and the line between them was re-surveyed in 1882. This line was known as Brown's line, and admittedly was correctly located, but the question arose whether the road allowance should be laid off to the north or to the south of that line. Up to 1882 only a small portion of this road allowance had been opened, that portion being south of Brown's line, but in that year a petition was presented to the council of the united counties under the provisions of R. S. O. 1877, ch. 174, sec. 516, praying that the opening of the road by the townships of Williamsburgh

Statement. and Winchester might be enforced, and the council, after fully considering the matter passed, in 1883, a by-law opening the road to the width of forty feet south of Brown's line. By a subsequent by-law the council, under the provisions of the Municipal Act of 1883, sec. 560, appointed the defendant Middagh, a commissioner, to remove obstructions from the road ordered to be opened up by the former by-law, and in carrying out that by-law Middagh cut down certain trees claimed by the plaintiffs, and removed these and portions of fences. Thereupon these actions were brought. No application to quash the by-laws had been made, and they were not repealed.

Osler, Q. C., and *J. P. Whitney*, for the appellants, the corporation. If the true location of the road allowance is not that defined by the by-law, still the council are protected against actions. If they act in good faith they are protected under section 549 of the Act of 1883 (R. S. O. ch. 184, sec. 549), whether the by-law be quashed or not; and, whether acting in good faith or bad faith, as long as the by-law stands, they are protected under sections 340 and 341 of the Act of 1883 (R. S. O. ch. 184, secs. 338 and 339): *Black v. White*, 18 U. C. R. 362; *Carmichael v. Slater*, 9 C. P. 423; *Lafferty v. Stock*, 3 C. P. 9; *Smith v. City of Toronto*, 11 C. P. 200; *Barclay v. Township of Darlington*, 5 C. P. 432; *Wilson v. County of Middlesex*, 18 U. C. R. 348; *Re Fenton and County of Simcoe*, 10 O. R. 27; *McMullen v. Township of Caradoc*, 22 C. P. 356; *Harrison's Municipal Manual*, 4th ed., 248, notes (e) and (f). At any rate the by-law can be supported as one to expropriate the road.

W. M. Douglas, for the appellant Middagh. Middagh acted in good faith, and without malice, and is protected by the by-laws.

Robinson, Q. C., and *Aylesworth*, for the respondents. The council acted without jurisdiction, as they have not opened the true allowance, and are not protected. Section 340 cannot have the wide application contended for,

because the decisions clearly show that the Court has a *Argument.* discretion to quash or not to quash a by-law when not illegal on its face: *Re Fenton and County of Simcoe*, 10 O. R. 27; *Re Milloy and Township of Onondaga*, 6 O. R. 573, and how could this discretion be allowed if the effect of refusing to quash would be to afford protection to all acts done under the admittedly illegal, though on its face valid, by-law? So also it is clear that the question of illegality may be decided in an action: *Sutherland v. Township of East Nissouri*, 10 U. C. R. 626; and if the proceedings are void the section has no application: *Alexander v. Township of Howard*, 14 O. R. 22. See also *Re Mace and County of Frontenac*, 42 U. C. R. 88. Clearly then the section is not of universal application, and the true construction is, to limit it to cases where there is jurisdiction to pass, and proper steps have been taken in passing, the by-law. If an illegal by-law protects, then if the time within which an application to quash it may be made, is allowed to elapse, there is no redress. The by-law cannot be upheld as one to expropriate a road because no notices were given: *St. Vincent v. Greenfield*, 12 O. R. 297; 15 A. R. 567; *Re Mace and County of Frontenac*, 42 U. C. R. 88. The plaintiffs, if not entitled to damages for trespass, are entitled to damages under the Tree Planting Act, 46 Vic. ch. 26; (R. S. O. ch. 201 :) *Douglas v. Fox*, 31 C. P. 140.

Osler, in reply. The discretionary power to quash presents no difficulty; the effect of what has been done, or may be done, under the by-law is matter for consideration on the application to quash. Here the by-law is either good, and we are justified, or else wholly illegal, and we are protected: *Re Scott and Tilsonburg*, 13 A. R. 233; *Graham v. McArthur*, 25 U. C. R. 478. The plaintiffs cannot set up any claim under the Tree Planting Act. That Act applies only to trees on the highway, and the plaintiffs say these trees are not on the highway. Had the plaintiffs contended that the trees were on the highway, the council could, under that Act, have directed them to be removed as an obstruction.

Judgment.

June 29th, 1889. HAGARTY C. J. O. :—

HAGARTY
C.J.O.

CONNOR V. MIDDAGH.

This action was tried some six months before the case of *Hill v. this defendant and the United Council*. The defendant here did not call witnesses to contradict the plaintiff's evidence as to the true position of the road allowance. His defence was rested almost wholly on the protection given by law to persons executing a by-law.

The same question as to protection arises in the other case with the larger issue as to the true position of the road.

The protection question is one of great general importance, and requires careful examination.

The Act of 1849, 12 Vic. ch. 81, seems to make the earliest provision on this head. Section 155. Any by-law may be brought before the Court, and if it appears that it is illegal in whole or in part, it may be quashed in whole or in part. It declares that no action shall be sustained by reason of anything authorized to be done under it unless it be quashed one calendar month before the bringing of the action, and if the corporation or any person sued for acting under such by-law cause amends to be tendered, &c., the Court is given discretion as to awarding costs.

In 1851 it was provided in 14 & 15 Vic. ch. 109, sec. 35, whenever a by-law has been quashed or declared illegal or void by any Court of competent jurisdiction, the municipality by whom it was passed shall alone be responsible for any acts done under it, and any clerk, constable, or other officer acting thereunder shall be freed and discharged from any cause of action accruing to any person by reason of such by-law being illegal and void, or having been quashed.

This Act is declared to be in amendment of the preceding Act, and the section 35, just cited, is not in substitution of any preceding legislation, but merely an amendment of the existing law.

Then in 1858 there was the Consolidated Municipal Act, 22 Vic. ch. 99. Section 201 reads as follows :

Judgment.

HAGARTY
C.J.O.

“In case a by-law, order, or resolution is illegal in whole or part, and in case anything has been done under it, which, by reason of such illegality, gives any person a right of action, no such action shall be brought until one calendar month has elapsed after the by-law, order, or resolution has been quashed or repealed, nor until one calendar month's notice in writing of the intention to bring such action has been given to the corporation; and every such action shall be brought against the corporation alone, and not against any person acting under the by-law, order, or resolution.”

In this shape it appears in the Upper Canada Consolidated Statutes of the following year, 1859, (C. S. U. C. ch. 54, sec. 202), and is in the same form of words continued down to the last Revised Statutes, 1887, (ch. 184, sec. 338) except as to the omission of the word “calendar.”

The earliest case that I have seen after the statute of 1849 restraining the right of action until quashing is *Dennis v. Hughes*, 8 U. C. R. 444 (1851.)

It was an action of trespass, and the plea set up a by-law for opening a road through plaintiff's lot, and justified the alleged trespasses under its authority. The plea was demurred to and held bad. The by-law directed a road to be opened as surveyed and laid out by one Walsh, as by his report to the council.

The Court considered the by-law bad on its face—a main objection being that there was no description of the line of road or its boundaries.

Sir J. Robinson, C. J., says, after a full consideration of the law on the pleadings: “I feel that some rather embarrassing questions may arise under the 155th clause. It is so expressed as to lead strongly, I think, to the conclusion that this Court was to entertain such objections only as might be raised upon the contents of the by-law, and not objections by reason of some alleged irregularity in the passing of it. But if the Legislature so intended,

Judgment.

HAGARTY
C.J.O.

it is not likely that they would, upon reflection, deprive parties of all recompense by action unless the by-law should be first quashed.

“However, some of these objections, which we think entitled to prevail, are objections of such a nature that the person injured could not be considered as restrained under the 155th clause from bringing an action till the by-law had been quashed—for they are such that if the by-law were valid, and while it stands, they yet go to shew that it afforded no certain warrant for opening a road over the *locus in quo*, but merely established as a road some line that it is declared a surveyor had laid out without stating what that line was; while the plea itself does not supply the defect by averring that before the by-law the surveyor had laid out a certain road over the *locus in quo*, and that it was this road which the by-law confirmed.”

The by-law was undoubtedly bad, and it might well be urged that as no boundaries were given to the proposed road, it described no certain line, and plaintiff could not know from it what part of his land was to be taken.

In *Reid v. City of Hamilton*, 5 C. P. 269, at p. 290, (about 1855), the case turned chiefly on whether the acts done required a by-law.

Sir James Macaulay says: “If a by-law had been passed no action could have been brought without its being quashed a full month before such action.” This case refers to *Re Barclay and Township of Darlington*, 11 U. C. R. 470. There is also the case of *Barclay v. Township of Darlington*, 5 C. P. 432, which went off on the question of notice of action to defendants, on which the two Courts differed. We may notice the remarks of Macaulay, C.J. He would seem rather to lean to the view that if the by-law was void on its face, it might, though not quashed, be impeached in an action against the municipality. But the point is not determined.

Then there is the case of *Carmichael v. Slater*, 9 C. P. 423. Trespass to plaintiff's land; plea justifying under by-law to open a road; demurrer, that the by-law did not

shew width of road nor right to take plaintiff's land, or any notice or compensation to plaintiff, or that it did not encroach on dwelling-house, orchard, &c. The plea was held bad. Draper, C. J., says, "Looking, however, at the plain language of the statute, we think this plea shews that the plaintiff is complaining of a wrong done under a by-law which the municipality had passed, and that the subject matter of that by-law was of a character respecting which they had legal powers and authority to pass by-laws. We cannot infer it has been quashed, but on these pleadings must intend the contrary; if illegal, the illegality would arise, so far as we can see, from matters *dehors* the by-law, such as want of notice, or that it opens a road contrary to the provisions of the statutes then in force." He then quotes the section as to quashing before action, and adds, "Either the by-law is not quashed, and then the statute says no action shall be brought; or it is quashed, and then the statute says the action shall be brought against the corporation alone."

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C.J.O.

In the preceding Term of 1859 we find *Black v. White*, 18 U. C. R. 362, also a case of trespass to lands with many pleas and demurrers. All the pleas set out a by-law for opening a road, &c., which had never been quashed or repealed.

The pleas which averred that the acts were done by the defendants under the by-law were held good. The plaintiff sought to answer them by replying that the road in question ran through or encroached on his orchard without his consent contrary to the statute. Defendants demurred and had judgment.

Sir J. Robinson, C. J., says: "The defendants object that admitting the by-law would be illegal * * if it authorized a road to be laid out through the plaintiff's orchard, yet the effect of that would be that, as the objection would be one appearing on the face of the by-law, no action would lie until one month after the by-law had been quashed, and then only against the corporation. This would be so certainly, whether we are to take this case as

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governed by the 201st section of the present Municipal Act or by the former statutes. * * Effect was given to this provision in the case in the Common Pleas of *Barclay v. Municipality of Darlington*, 5 C. P. 432, and I do not see on what ground we can refuse to give effect to it here. * * The plaintiff * * shews us very plainly that he is charging the defendants with being trespassers by reason of the illegality of a by-law, which, if it were free from objection, would shew that he had no cause of action; and yet he does not traverse the statement in the defendants' pleas that the by-law has never been repealed or quashed. This being so, we have to consider whether the 201st clause is not fatal to his action, and that depends upon whether the action can be fairly said to be brought against the defendants for *any thing 'done under the by-law.'* In other words, must those words be held to mean only anything done in the execution of the by-law, or for the purpose of carrying it out; or should they not be construed to mean also anything done in reliance on the legality of the by-law, as in this case entering upon land which, if the by-law be valid, was a public highway, but which, if the by-law be not valid, leaves the defendants exposed to be treated as trespassers? The case seems to me to turn upon that point, and certainly, unless the latter construction can be adopted, the Act will in this respect fail in many cases of the effect which I think must have been intended."

Burns, J., says: "The question is therefore simply this, whether it appears there was anything done under the by-law which by reason of its illegality gave this plaintiff a right of action. It is not necessary that the illegality should appear on the face of the by-law in order to bring into operation the provisions of this section. If the fact be as stated in the replications, that the road in question ran through an orchard of the plaintiff, there can be no question about the by-law being illegal. The plaintiff contends he was under no necessity, however, to apply to have it quashed, but might bring his action. There may be cases wherein parties might maintain actions without taking

that course, but I apprehend the effect of the section is, to deprive parties of any action whatever against any one so long as the by-law has neither been quashed nor repealed, whenever it appears in the action, if brought, that what is complained of is a thing done under the by-law. Whenever the by-law shall be quashed or repealed, then the action shall be brought against the corporation alone, and not against the person acting under it. * * * The question under these pleas is, whether the by-law is a justification to defendants, though it be illegal, the same not having been quashed or repealed. I think the by-law justifies the defendants. They need not go behind that for their defence. They would have a right, I think, to assume in what they were doing that the council had not passed an illegal by-law, but that if it were necessary to have the plaintiff's assent to the line of road upon his farm going through an orchard, that it had been obtained."

Judgment

HAGARTY
C.J.O.

In the same volume is *Wilson v. County of Middlesex*, 18 U. C. R. 348. It was an action of replevin, and the Court held this clause did not bar the action until the by-law was quashed. "We do not think that that provision extends further than to prevent actions being brought for the recovery of damages, in which it may be important to be able to tender amends."

See also *Haynes v. Copeland*, 18 C. P. 150, at p. 159, per Wilson, J.

Another case is *Smith v. City of Toronto*, 11 C. P. 200, (1861.) Declaration for illegally depriving plaintiff of his license. Plea setting out a by-law under which license was granted; breach of one of the conditions whereby he became liable to forfeit his license; that he did forfeit, and was deprived. Demurrer, no power to pass such by-law.

Draper, C. J., says, the plaintiff does not aver the by-law has been quashed "and conceding for the argument's sake that it was *ultra vires*, still, by sec. 202, no action can be brought until one month after the by-law, illegal in whole or in part, has been quashed * * . If the by-law is illegal, but not quashed, the action would not be maintainable under the 202nd section."

Judgment.

HAGARTY
C.J.O.

I find one case *Campbell v. Township of Elma*, 13 C.P.296, of trespass to goods. Plea justifying under a by-law of the defendants; demurrer that it was no answer. Judgment was given for defendants, but there was no suggestion or mention as to quashing, or the necessity of quashing.

These are the cases in which the question is most directly in issue.

There is an apparent uncertainty in the language of the Judges in the earliest case of *Dennis v Hughes*, 8 U. C. R. 444, soon after the Act of 1849, where the provision is first found.

But in the later cases of *Black v. White*, 18 U. C. R. 362; *Carmichael v. Slater*, 9 C. P. 423, and *Smith v. City of Toronto*, 11 C. P. 200, the Courts speak with no uncertain voice.

I feel the greatest possible difficulty in holding that the section of the statute so much relied on is so limited in its application as seems to have been held in the Court below.

This protecting clause has been in our statutes since 1849, since the Act which recasts the early Act of 1841, and created the township municipalities.

The Legislature was creating several hundred inferior representative bodies and endowing them with large powers of interference with private rights and properties.

Their by-laws would have to be enforced by individual officers or servants, and it was felt that the strict rules of law might be not unfrequently violated, and claims for damages incurred both as to the council and the executors of its mandate.

In the passing and preparation of these by-laws and in ascertaining whether all the statutable requirements and conditions precedent had been fulfilled, very great care was necessary, and, as the innumerable cases before our Courts during the last forty years can testify, it was very hard to be always free from some omission or miscarriage which Judges would be compelled to hold fatal to the legality of the whole proceeding. It would be a most unfortunate state of the law if, in actions of trespass against the muni-

cipality enacting the by-law or against those to whom its execution was committed, at the trial every objection should be open and if the success or failure of the action were to depend on the proof of exact fulfilment of all conditions necessary to warrant the passing of the by-law.

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C.J.O.

This was justly felt to require some restriction, and we have noticed the legislation from its beginning.

For many years no time was limited for moving to quash by-laws. In 1866 the time was limited to one year.

As far back as 16 Vic., under the Municipal Loan Fund Act, it was declared that by-laws under it should not, after approval by the Governor in Council, be invalidated by any error in fact, or incorrectness in recital.

A very stringent provision as to by-laws providing for the issue of debentures, was introduced, noticed by this Court in *Bickford v. Town of Chatham*, 14 A. R. 32, by 44 Vic. ch. 24.

Again in 1883, by section 354 of the Consolidated Municipal Act of that year, it is provided that such by-laws can only be quashed within three months from registration, and if not so quashed, are to be absolutely valid and binding.

As early as 1858, 22 Vic. ch. 99, consolidated in the following year (C. S. U. C. ch. 54,) there were certain "promulgative" clauses. As to by-laws imposing rates, an application to quash must be made within six months from promulgation; and section 201 provides that if not quashed on application within the time limited, the by-law "so far as the same ordains, prescribes or directs anything within the proper competence of the council to ordain, prescribe, or direct, shall, notwithstanding any want of substance or form, either in the by-law itself, or in the time or manner of passing the same, be a valid by-law."

The same provisions appear in the Act of 1883 (sec. 333), and in the last Revised Statutes, 1887.

This last citation as to the rate by-laws, duly promulgated, being within "the proper competence of the council," seems the only reference in the statutes that I have seen

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beyond the usual expression as to by-laws, "illegal in whole or part."

I doubt if it carry the question any further than the requirement that the by-law be on a subject properly cognizable by the municipality as within their general jurisdiction.

If their "competence" depend on the due observance of every formality as to notice, time, application of parties, neglect or refusal of others to do the work, then of course the protection intended by the Legislature to those acting under the by-law is so narrowed as to be practically useless.

Every by-law is illegal if not passed with all substantial requirements of the law being complied with, and, on application to the Courts within the limited time, will be quashed.

But the serious question which we have to determine is this, is the effect of the legislation past and present to require all objectors to the validity of a by-law, like that before us, to have such validity questioned and settled by the appointed legal tribunal ; and, if the time limited for such questioning be past, then how far is protection given to persons acting under it ?

We need not embarrass the case by any *argumentum ad absurdum*, such as the effect of a by-law to regulate the colour of each ratepayer's coat, or the number of windows he may open in his house.

We need only discuss the effect of a by-law passed on a subject, which, under certain conditions and requirements, is within the general competence of the council.

The plaintiff charges that the corporation wrongfully required the defendant to throw down and remove the plaintiff's fences ; but that as to the residue of the trespasses he was not authorized.

That he pretends the acts were done under the authority, in the removal of obstructions, but that the trees and fences were not obstructions ; and in any event that the trees could not be cut down without a special resolution of the council.

The following are the by-laws :

Judgment.

“ No. 709.

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“ By-law for opening the road between the townships of Winchester and Williamsburgh.

“ Whereas, at the November session of the Municipal Corporation of the United Counties of Stormont, Dundas, and Glengarry, a petition was presented by Samuel H. Kendrick and others asking this Council to pass a by-law opening the road between Winchester and Williamsburgh to the width of 66 feet, on the south side of Brown's line, on notice being given to all parties occupying lands affected thereby, which notice having been duly given.

“ And whereas it is deemed expedient to comply with the request contained in the said petition, in so far as to open the said road on the south side of the said line to the width of forty feet.

“ Be it therefore enacted a by-law of the said Corporation that the said road between the said townships of Winchester and Williamsburgh be, and the same is hereby opened to the full width of forty feet on the south side of the said line, and declared to be an open and public road for all general purposes and to be used as such from the passing of this by-law for all time thereafter.

“ But nothing herein contained shall be held to warrant a reduction of the width of any part of the road previously opened or a removal of any of the old road between the townships aforesaid from its present or previous position, nor as an abandonment of the right of the council to any portion of the said boundary line, road, or allowance for road.

“ Passed, &c., 26th January, 1883.”

“ No. 743.

“ By-law appointing a commissioner to remove obstructions from the boundary road between Williamsburgh and Winchester, in the county of Dundas.

“ Be it therefore enacted a by-law of the United Coun-

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ties of Stormont, Dundas, and Glengarry, that John Middagh, of Winchester, be and he is hereby appointed a commissioner, with instructions to remove all obstructions from the boundary road between Williamsburgh and Winchester, as defined or described in a by-law passed by this Council on the 26th day of January, 1883, and numbered 709.

“20th June, 1884”

I do not see how it is possible to hold that the defendant was not acting under the by-law in doing the acts complained of and for which the action is brought. The by-law directs the opening of the road and directs it to be opened forty feet wide on the south side of Brown's line. Then Dillon is appointed to execute. He does so in part and takes down the plaintiff's fences, but does not touch the trees. The plaintiff reinstates the fences which Dillon took down.

Then the second by-law, above set out, specially directs the defendant to do the work and to remove the obstructions in the way directed by the preceding by-law, and the appointment of the defendant and his express instructions leave no doubt of the purpose of the council and of his mission specially to carry out that purpose.

A large portion of the evidence at the trial went to shew that a road could have been made there passable for the public without cutting the trees. But the express directions were first, to open a road forty feet wide; second, to remove obstructions therefrom. I think it plain that to carry out his orders the trees had to be removed. The defendant accordingly removed them.

The plaintiff was fully aware of the by-law. He had a copy of it in his house and produced it, and examined it with the defendant, and he urged that it did not require the trees to be removed.

I do not see how the use of any violent language on the defendant's part can affect the decision of the question whether he was really acting under the orders of the council. I cannot understand for what purpose he was there except to execute such orders under the by-law.

A man executing legal process may indulge in abusive or violent language; he does not thereby lose the protection of his warrant. If he commit trespass or violence beyond the fair execution of his mandate he is responsible. All that was done here was in opening the prescribed road and removing obstructions, and the road could not be laid out or opened to a width of forty feet except by doing all the acts complained of.

Judgment.

HAGARTY
O.J.O.

In the well known case of *Lucas v. Nockells*, 10 Bing. 157; 2 Y. & J. 304; 1 C. & F. 438, the following question was put to the Judges in the House of Lords: "Was it competent in law, on these pleadings, for the plaintiff to shew at the trial, in maintenance of his action, that the acts of the defendants were not really done under or in execution of the writ, but for another purpose, under another claim, and that the writ and the proceedings under it were a mere colour and contrivance to get possession of the goods?"

A majority of the Judges held that it was competent, and the Lords affirmed their view.

In delivering the judgment of the Lords, Lord Wynford said, 1 C. & F. at p. 493: "If a man has a writ which affords him a complete justification for all that has been done, though he has not done it with the view of obeying the exigency of the writ, yet having that authority, his justification is made out. Suppose one man knew that another had committed felony, and should, for private reasons, indict that other, though his motives in doing so might be most malicious, he would be justified if he proceeded exactly according to the forms of law. In all the cases where the writ which the party has had, has been a justification for all that he has done, he has followed it exactly." See the remarks of Parke, B., on this case in *Oakes v. Wood*, 2 M. & W. 791.

I am of opinion that the defendant Middagh did nothing beyond the performance and execution of the duty with which he was intrusted, and the mandate on which he acted.

Judgment.

HAGARTY
C.J.O.

The plaintiff is asked if he thought that if it had not been for a by-law of the county council the defendant would not have come to his place and interfered with the trees. He answers: "I think if he had not been in office he would not." And it is to be borne in mind that the plaintiff examined the by-law with the defendant.

I am unable to understand what there is to warrant the finding of the learned Judge that he was not acting under the by-law, or that he could have made the road without cutting down the trees. His mandate was to open the road of a given width, and to remove obstructions from it. It is clear that whether lawful or unlawful it could not be done without cutting down the trees.

That the defendant acted with a strong determination to carry out what he was employed to do, and persisted in doing so against all the plaintiff's active opposition in the way of throwing down planks before the horses, &c., is evident. He was there expressly for that purpose, the former officer appointed having failed so to do.

As to his acts, it seems to me to be wholly beside the question as to his statutable protection what his motives as a Winchester road superintendent may have been. So long as he was acting under his authority, and kept strictly within it, I think that is sufficient.

I am satisfied from the evidence that he fully believed that he was so acting, and that he had full authority for all he did.

It seems to me unimportant what his opinion or knowledge may have been as to the motives actuating the county council in passing the by-law.

Generally all persons, such as constables, acting on a warrant, are protected so long as they act in obedience thereto, and are not required to question its authority or take advice as to its legality.

I think our Legislature recognized fully the position of persons acting like constables in carrying into effect the directions of a by-law interfering possibly with private rights, by the protection extended to them under the municipal Acts.

It would be as unreasonable as it would be unfair to require the executive officer to obtain a legal opinion as to the validity of a by-law before venturing to enforce it.

Judgment.

HAGARTY
C.J.O.

I think the defendant here is protected against this action.

I do not consider that any question arises on the Tree Planting Act. The case is rather to be considered as that of opening a road through an orchard, &c.

It is not a case of a man planting trees on a highway, and I cannot see how it can be brought within the letter or spirit of the Tree Planting Act.

HILL V. MIDDAGH ET AL.

I have set forth at length my reasons for holding in the case of *Connor v. Middagh*, that the defendant is entitled to the judgment of the Court. His position as an officer executing the by-law is the same in all respects as it is in this case, and I think the result must be the same.

I have now to consider the liability of his co-defendants the county council. If the by-law, under which the trespasses here complained of were committed, be one falling within the words of section 340 of the Municipal Act of 1883, (which governed these proceedings), then the remedy is barred as it has never been quashed.

“In case a by-law, order, or resolution is illegal in whole or in part, and in case anything has been done under it which, by reason of such illegality, gives any person a right of action, no such action shall be brought until one month has elapsed after the by-law, order, or resolution has been quashed or repealed, nor until one month's notice in writing of the intention to bring such action has been given to the corporation, and every such action shall be brought against the corporation alone, and not against any person acting under the by-law, order or resolution.”

The words used by the Legislature are very comprehensive, and would seem in terms to cover every case of an illegal by-law.

Judgment.

HAGARTY
C.J.O.

I think the Legislature has wisely provided, as a most important element in the scheme of municipal government, essential to the working of a complex system of local legislation, that, prior to the right to seek damages for any interference with private rights, the judgment of a Court shall be sought and obtained that the local law warranting such interference is illegal and beyond the limited authority given to the enacting body.

If ever there were a case illustrating the wisdom and vindicating the necessity of this special provision, the present may be referred to.

A long pending local dispute and a most costly series of law suits extending over several years have been the result of a non-observance of this salutary statutable remedy.

The by-law was passed over six years ago, in January, 1883. The alleged trespasses were committed in July, and all the parties interested had six months after their damage accrued to move to quash the by-law.

I am of opinion that it would have been quashed on the facts disclosed, on the ground (*inter alia*) that there being an existing strongly contested dispute as to whether the original allowance was on the north or south side of Brown's line, the council chose to assume in the by-law that it lay on the south side.

Such cases as *McMullen v. Township of Caradoc*, 22 C. P. 356, may be referred to. There the by-law directed the road to be opened, giving the metes and bounds, and declared that the road so described should be and was the side road between the lots, &c. This latter declaration was ordered to be struck out. The true position of the road had been in dispute for years.

The Court say : " We do not question the right to open the allowance, nor do we interfere with any description they may choose to give. But we think we must not embarrass any property owner in the fair trial of his rights, by leaving the by-law with a *quasi* legislative declaration as to its operation. The present state of the statute law as to the possible effect of a by-law not quashed by the Court, is a strong reason for removing this clause."

Mr. Justice Gwynne adds: "A person *bond fide* contesting the true site of the road has, I think, reason to complain of such a clause being inserted in the by-law, as calculated to expose him to difficulties at any rate, if not to prejudice him in the conduct of any litigation which he may institute for the purpose of bringing the point in difference up for judicial enquiry; but in enacting that the original allowance shall be opened, although describing that road by metes and bounds, I do not see that the applicant can be prejudiced, for, in any litigation arising upon the point, it would, I apprehend, in such a case, be necessary to establish that the metes and bounds assumed to be are in fact the true limits of the original allowance."

Judgment.

HAGARTY
C.J.O.

I am inclined to think that the Court might have also struck out the metes and bounds set out; but on the *falsa demonstratio* principle the true subject of the by-law was the opening of the original allowance wherever it was in fact.

I think the by-law before us directs the opening of a road of a certain width along the south side of Brown's line. All other objections as to the manner in which it was passed would have to be considered.

It is argued that this by-law is not only illegal but wholly void, and was passed by a body having no power to pass it.

If it be void it is certainly also illegal—the word used by the Legislature. It is suggested that it may be treated as if it directed the opening of a road in the counties of Leeds and Grenville.

I cannot accede to this argument.

I think certain cases are provided for in the Municipal Act in which the county council has power to open a road allowance between townships.

If this by-law had merely directed that the original allowance between the two townships be opened, and this had been done with all due formalities observed, it could not have been quashed on motion, and any damages for trespass beyond such original allowance could be recovered by action.

Judgment.

HAGARTY
C.J.O.

If it be read as a by-law to open a road—not an original allowance, but defined by the council by apt description, it could be quashed on proof of any failure of jurisdiction or excess of power. But unless and until quashed, I should hold the statutable bar to apply.

I think this by-law would have been quashed. It directs the road to be opened up south of the line in a described course. If it be read as a by-law to open the original allowance, it would be bad on the principle of improperly directing the road to run in a course, then a matter of vehement dispute. If it be read as a by-law to force a new road through private property, the evidence shews that proper steps had not been taken to warrant it. In either view I think it would be quashed by the Court.

In 1874, 37 Vic. ch. 16, sec. 17, substituted a new section for sec. 410 of the 36 Vic. ch. 48, and gave a county council exclusive jurisdiction “over every road or bridge dividing different townships, although such road or bridge may so deviate as in some places to lie wholly, or in part, within one township.” But these words are omitted in the Revised Statutes of 1877, and do not appear again as far as I see.

In the Act of 1883, 46 Vic. ch. 18, section 565 authorizes the county council to pass by-laws (sub-sec. 2) for opening &c., roads &c., running or being between two or more townships, or any bridge, &c., as the interests of the inhabitants of the county in the opinion of the council require to be opened, made, &c.

By section 533 the county council may assume, make, and maintain any township or county boundary line at the expense of the county, &c.

By section 556, whenever township councils fail to maintain boundary lines not assumed by the county council in the same way as other township roads, &c., it shall be competent for one or more of the councils to apply to the county council to enforce joint action on all township councils interested.

Section 557. Where all the township councils interested neglect or refuse to open up and repair such lines of road

in a manner similar to the other local roads, it shall be competent for a majority of the ratepayers resident on the lots bordering on either or both sides of such line to petition the county council to enforce the opening up and repair of such lines of road by the township councils interested.

Judgment.

HAGARTY
C.J.O.

Section 558. The county council receiving such petition either from township councils or from ratepayers may consider and act on same, &c.

Section 559. They may determine on the amount which each council interested shall be required to apply for the opening or repairing of such lines of roads or to direct the expenditure of a certain portion of statute labour or both, as may seem necessary to make said lines equal to other roads.

Section 560. It shall be the duty of the county council to appoint a commissioner to execute and enforce their orders or by-laws relative to such roads. If the representatives of the interested townships intimate to the council or commissioner their intention to execute the work themselves, then the commissioner is to wait a reasonable time, but if the work is not proceeded with during the favourable season by the township officers, then the commissioner shall undertake and finish it himself.

Section 561 allows the application of township moneys in the hands of the county treasurer, on the commissioner's orders for the work, &c.

It seems clear that provision is made for the county council opening such a road under certain circumstances declared in the statute; and that the by-law, therefore, directs the doing of a work, lawfully within the county council's jurisdiction if such circumstances exist.

If its binding efficacy fail in consequence of the non-existence of some necessary preliminary or from the failure to observe some statutable notice or formality, the by-law may be quashed as illegal, not because it professed to deal with a matter or subject wholly outside its jurisdiction, but because the proper steps had not been taken to bring

Judgment.

HAGARTY
C.J.O.

it formally within the jurisdiction which the statute had conferred on the council. I see a very marked distinction between the two cases. It is not easy to draw any fixed line between an illegal and a void by-law.

We have had many cases before the Courts in which municipalities legislating on a general subject, such as the regulation of markets, or charging fees on various market products, step beyond their authority, and apply their powers to a larger class of dealers than the class specially named, or impose a toll on an article not placed under their power, and then the toll or duty is illegal, and is wholly void when attempted to be imposed beyond the statutable power. The by-law is also illegal, and would be quashed. See such cases as *Re Fennell and Town of Guelph*, 24 U. C. R. 238.

I think the corporation officers would be protected for any action taken by them under the by-law till quashed.

I am aware of the general importance of the question now before us, and have given it my most anxious consideration. I have arrived at the conclusion that this action is barred under the statute.

We must see how far this bar operates. This is not a proceeding to enforce the by-law. It is not a claim to obtain possession of property held or taken under the by-law. It is simply a claim for damages against the corporation and its officer for acts done under the by-law, and it is only to such claim for damages that the Legislature requires the preliminary proceeding of obtaining the judgment and decision of the Courts as to the validity of the authority under which the acts were done for which damages are claimed.

If we declare the provision not to apply to this case, we, in effect, transfer to the trial Court, before which the action is brought, the investigation of all the points and objections which are now properly investigated on a summary application to quash, and we leave the officers of the corporation to execute its by-laws at their peril.

Claims of this character for damages have been fre-

quently limited as to time, and also as to preliminary action by the parties injured, prior to their right to sue. All statutes of limitation are based on this right to restrict. Acts relating to injuries received by the execution of railway works, public improvements, turnpike roads, compensation clauses, &c., &c., may be readily referred to.

Judgment.

HAGARTY
C.J.O.

We may especially notice the protection given to magistrates while acting as such. If they exceed their jurisdiction no action can be brought until the conviction or order has been quashed. The action must be brought within six months, and a month's previous notice in writing given.

I am at a loss to understand how the equally strong language of section 340 should not be construed as giving an equal protection to the present defendants.

It is not easy to explain why the acts of a county council should not be equally respected or protected as that of a justice of the peace.

The late Sir J. B. Macaulay, who devoted much of his noted industry to the construing of Municipal Acts, in *Reid v. City of Hamilton*, 5 C. P. 259, at p. 290, said: "By-laws, as affording protection to those enforcing or acting under them, bear analogy to convictions, which afford a like protection till quashed. * * If a by-law had been passed, no action could have been brought without its being quashed a full month before such action." I may also refer to his remarks in *Barclay v. Township of Darlington*, *ib.* 432.

I need not do more than refer to the cases cited and commented on in my judgment in *Connor v. Middagh*.

When the by-law of the county council was produced in Court, I think it would shew that it was passed on a subject and for a purpose for which, under certain circumstances, and on the existence of certain facts, it might be properly passed by the council.

I do not think it was necessary that it should shew on its face all the circumstances required by the statute, and I consider the defendants were entitled to the protection of the statute on its being shewn that the damages sought

Judgment.
HAGARTY
C.J.O.

to be recovered were for acts done in its execution. I think it should as to such claims for damages be held good until quashed.

The case would be different if it were sought by action to enforce its provisions on behalf of the body which passed it, or if it were put in evidence to prove or disprove title to property.

My views are confined wholly to the claims for damage mentioned in the statute.

It was said on the argument that in some of the cases in our Courts remarks were made on motions to quash, to the effect that the Court would not interfere as asked, but leave the parties to their ordinary legal rights and remedies. I am not aware of any case in which the motion to quash was refused when a by-law, authorizing *e.g.*, the entry on property, was shewn to be illegal, or that the necessary preliminaries or requirements had not been observed.

Remarks may be referred to which have been made in such cases as *County of Lincoln v. Town of Niagara*, 25 U. C. R. 578, where Draper, C. J., said at p. 583: "It is said the defendants should have moved to quash the by-law. On such motions the Court have a discretion to exercise, but here the plaintiffs come into a Court of law to recover under their own by-law; the Court have no discretion to deny to the defendants the right of contesting on any legal ground their liability to pay."

So in *Secord and County of Lincoln*, 24 U. C. R. 142 where the Court refused to quash, the same learned Chief Justice said, (p. 151): "I am not deciding that it is proof against all exceptions, or that when it is attempted to carry out its provisions there may not be difficulties to overcome. Those who may be applied to to advance money on the debentures will, for their own sakes, look to this, for our refusal to quash the by-law involves no such ulterior questions."

A good deal of the evidence and a large portion of the judgments of the Courts below are devoted to a consider-

ation of the charges that the by-law was not passed in good faith, but for wrong and improper motives and purposes.

Judgment.
HAGARTY
C.J.O.

I am unable to see how all this discussion is relevant to the decision of the question before us.

If there was good foundation for all these charges, they could have been fully investigated and disposed of on a motion to quash. See *Re Morton and City of St. Thomas*, 6 A. R. 323; *Re Vashon and Township of East Hawkesbury*, 30 C. P. 194.

I am of opinion that the Legislature did not intend that such questions against a by-law should be left for discussion and determination by a Court or jury at *nisi prius*.

They may arise in actions against justices where, though acting within their jurisdiction, they must be charged with malice.

If they can properly enter into the discussion of this case, I feel bound, with much respect, to differ from the very harsh view expressed in very strong language as to the conduct of the county council.

I think they were ill-advised in the course they ultimately took. Their surveyor had reported to them that the allowance was on the north side of Brown's line. Afterwards a large quantity of evidence was adduced before them disputing this conclusion.

They seemed to entertain serious doubts as to which contention was right, and it would seem as if the inclination was not to force the opening of the line as recommended by their surveyor on the north side, many buildings being in the way, and there being strong doubts as to the true situation, and they finally adopted the course of directing a forty foot road at the south side, to be opened on a course or track which had for many years been in actual use.

About the time the by-law was passed it was spoken of that the council would pay the costs if an application would be made to quash the by-law. It is difficult to understand why a motion to quash was never made.

It was most unfortunate that the council should have

Judgment.
HAGARTY
C.J.O.

passed and enforced the by-law until the true line had been clearly ascertained, and at least equally unfortunate that the parties interested did not resort to the proper statutable course of testing its validity during the six months between its passing and its enforcement. Every one interested seems to have had the fullest notice of the by-law being passed.

I repeat that I fail to accept the charges of bad faith, collusion, &c.

I think it impossible to doubt but that the council thought and believed that they had the right and jurisdiction to pass the by-law and to enforce it.

A contrary belief involves the conclusion that they knew they were wrong, and were passing a by-law they knew they had not the jurisdiction to pass or to enforce, and were knowingly incurring heavy legal responsibilities for knowingly trespassing on private rights.

I also think it clear that the defendant Middagh undoubtedly thought that he had the right to do what he did under the by-law.

As to section 549 of the Act of 1883, providing for the case of a council in good faith making a mistake and opening an allowance not wholly on the true line, but as near as could be reasonably ascertained, I do not consider it affects the point I have been discussing. It may apply after quashing the by-law—the new line is not to be disturbed or action brought in respect of the opening, but compensation has to be made if claimed within a year.

I am satisfied that the council entertained, and had fair ground for entertaining, the gravest doubts as to whether the original survey made over ninety years ago made the allowance north or south of the township line.

I had the advantage of hearing, for several days, a most able and exhaustive analysis by very eminent counsel, of all the attainable evidence. I am content to share the blame, if any, attachable to the county council for not being perfectly clear upon the point.

I think the conduct of the council entitled to a somewhat milder consideration than has been accorded to it.

Judgment.

HAGARTY
C. J. O.

All the preceding part of this judgment concerns the very important question that even if the actual locality of the road had not been on the south side, yet that the council having general jurisdiction in the subject matter, would be entitled to the statutable protection.

My learned brothers have arrived, after great consideration, at the clear opinion that the road under the old survey is on the south side where the by-law places it. I do not dissent from their view, but think on the whole perplexing mass of testimony that it is the safest conclusion to be drawn. I think the council have the right to urge both lines of defence, and the appeal must be allowed.

BURTON J. A. :—

[The learned Judge after discussing the evidence and coming to the conclusion that the road allowance lay to the south of Brown's line, continued:]

In this view of the matter the by-law was a complete protection although somewhat informal and irregular, which might possibly have furnished grounds for quashing, but until quashed I think the action was not maintainable.

Under these circumstances it is unnecessary to offer any opinion as to the necessity of quashing it. The trespass had been committed, as I at first supposed, upon what was not the road allowance.

I had prepared a judgment when I was under that impression giving my reasons in full for holding that it was unnecessary to quash the by-law, as it could afford no justification for doing something which was wholly beyond their jurisdiction. If it had been merely to open the allowance, and Middagh had committed the trespass upon lands not comprised within the allowance, the by-law would have afforded no protection to him; if, on the contrary, the council assumed to describe the allowance, and

Judgment.
BURTON
J.A.

that description proved to be inaccurate, they would, if they authorized anyone to act on it, be trespassers acting wholly without jurisdiction, and would, I apprehend, be liable without going through the form of quashing.

That appears to have been the view of the Court of Common Pleas in *McMullen v. Township of Caradoc*, 22 C. P. 356, where the council, as here, not content with passing a by-law in general terms to open an allowance, assumed to describe it.

The learned Chief Justice of this Court is reported as having said on that occasion :

“ If the by-law confined itself merely to declaring that the road should be opened, giving Springer’s metes and bounds by way of description, I think we could not interfere. The defendants have a clear right to open an original allowance, and in so doing, they must at their peril be correct as to its true position.”

And again : “ The by-law is not void on its face. It affects to give a description by certain fixed boundaries in accordance with posts put down by Springer. These may be right, or they may be wrong. When the defendants attempt to enforce it, that question may be determined.”

And further : “ The by-law is to open the original allowance, and cannot, as we think, authorize a trespass on any land shewn not to be part of such allowance.”

And Mr. Justice Gwynne adds : “ If the limits assigned be not the true limits of the side road as originally surveyed, the council has no jurisdiction to enact and declare that they shall be ; * * but, in enacting that the original road allowance shall be opened, although describing that road by metes and bounds, I do not see that the applicant can be prejudiced, for, in any litigation arising upon the point, it would, I apprehend, in such a case, be necessary to establish that the metes and bounds assumed to be are in fact the true limits of the original allowance.”

A clear indication of the opinion of the Court, I should have thought, that the by-law would afford no defence to an action for any trespass *extra* the road allowance ; a

view of the law which has received recognition by the Legislature by the passage of section 549, of the Act of 1883.

Judgment.
BURTON
J.A.

It is, however, not necessary and perhaps undesirable to express any judicial opinion upon this point in the view which we take of the position of the road allowance, and I therefore content myself with saying that I do not agree in the judgment of the learned Chief Justice of this Court as to the necessity of quashing the by-law in this case upon that state of facts; the necessity arises only in my opinion when the councils have jurisdiction over the subject matter which in the case supposed they would not have.

I think the judgment of Chief Justice Macaulay in *Lafferty v. Stock*, 3 C. P. 9, at p. 17, is still good law although it would not have been necessary to go that length for the purpose of holding that in the cases supposed it was not necessary to quash.

For the reasons mentioned, however, I think the appeals in both cases must be allowed.

OSLER J. A. :—

That the defendants, the counties council, had a general jurisdiction to open the road on the place in question assuming it to be the true original allowance for road, cannot, I think, be disputed. It was a power which they possessed under sections 557-560 of the Municipal Act of 1883, and I should infer from the evidence that all that was done, including the passage of the by-law and the subsequent proceedings, was intended to be done in the exercise of the powers which are conferred upon them by those sections.

It seems to me equally clear that under section 565 of the same Act, the defendants had also the general power of opening and making a road, not upon an original road allowance, that is to say, "a road *within* one or more townships in the county." No doubt if they open and make such a road, they must not only comply with the

Judgment.

OSLER
J. A.

conditions precedent to the exercise of the power, but must also make compensation under the provisions of the Act to the owners of the land taken by them for the road, and if such conditions precedent are not observed, the by-law is illegal and will be set aside. Nevertheless a by-law to open such a road need not differ in form from the by-law 709 in question, and therefore this by-law cannot be said to be illegal upon its face. Dealing, however, as it does with a subject within the general jurisdiction of the council—that is to say, with the opening of roads—I do not think that the test of the necessity for quashing it before bringing an action for anything which may have been done under it, depends upon the question whether or not it is bad upon its face. For the purpose of this case, it may be assumed that the council, not only by the by-law profess to open the original allowance for road, but that they also illegally (and in that respect exceeding their jurisdiction) describe that road or that part of it which they open as being a strip forty feet in width on the south side of Brown's line; and they further declare that the strip so described is and shall be the road so opened.

The by-law expressly enacts, "that the said road be and the same is hereby opened to the full width of forty feet on the south side of the said line, and declared to be an open and public road for all general purposes, and to be used as such from the passing of this by-law for all time thereafter."

It is impossible to say that the by-law authorizes the opening of the road allowance generally, wherever it may happen to be, or anywhere except in and upon the land so described and defined, and therefore by its very terms it was an authority to those who acted under it to open the road in that place.

It is well settled upon the construction of section 334 of the Act that a by-law may be quashed by the Courts not only for illegality appearing *dehors* the by-law itself, but also for illegality appearing on its face: *Re Fenton and County of Simcoe*, 10 O. R. 27, where the cases are col-

lected; *Scott v. Town of Tilsonburg*, 13 A. R. 233; *Re Ostrom and Township of Sidney*, 15 A. R. 372, but it is to be borne in mind that the leaning of the Courts or of some of the Judges in the earlier cases was that it could only be quashed on the latter ground, *i.e.*, for some illegality appearing on its face.

Judgment.

OSLER
J.A.

The provisions contained in section 155 of the then Municipal Act, 12 Vic. ch. 81, as to quashing a by-law for illegality before action brought for anything done under it, were substantially the same as the present law except that relating to the protection of the officer, which was introduced by the 14 & 15 Vic. ch. 109, sec. 35, and that as to notice of action to the corporation, by 22 Vic. ch. 99, sec. 201; C. S. U. C. ch. 54, sec. 202; and I think it was very much owing to the plain and comprehensive language of this section and its successors that the Courts felt themselves compelled to construe the power given them to quash by-laws as extending to cases where such by-laws were not bad on their face. I have found no case except *Barclay v. Township of Darlington*, 5 C. P. 432, in which it is suggested that for acts done under a by-law, illegal and void on its face, an action will lie without first quashing the by-law. Undoubtedly Macaulay, C. J., there says so, and what that eminent Judge says, even as he there said it, *obiter*, is entitled to great weight. I notice, however, that in quoting section 155, he introduces a word (*italicized below*) not found therein, for he quotes it as enacting that "no action should be sustained for or by reason of anything *legally* authorized to be done under the by-law, unless the by-law had been quashed," and if, as I cannot help thinking, he construed the substituted clause Schedule A, No. 21, of 14 & 15 Vic. ch. 109, (the one in force when the by-law there in question was passed), as being substantially the same in that respect as section 155, it might account for and would certainly warrant the view held by him.

Turning then to the Act as it now stands, section 340 of the Act of 1883, we find it enacted.

"In case a by-law, order or resolution is illegal in whole or in part, and in case anything has been done under it

Judgment.

OSLER
J. A.

which, by reason of such illegality, gives any person a right of action, no such action shall be brought until one month has elapsed after the by-law, order or resolution has been quashed or repealed, nor until one month's notice in writing of the intention to bring such action has been given to the corporation, and every such action shall be brought against the corporation alone, and not against any person acting under the by-law, order or resolution."

The language of this section is as wide as possible: "If a by-law is *illegal* in whole or in part, and in case anything has been done *under it* which by reason of such *illegality*, gives any person a *right of action*." What sound reason can be suggested for cutting down the plain meaning of these words? The object of the Legislature seems to have been in the first place to protect officers and persons acting ministerially in carrying out the by-law and in reliance upon it, and to confine the remedy of the person injured to the corporate body under the authority of whose illegal enactment the injury was committed, and secondly, to provide that the illegal legislation and apparent authority should be removed out of the way of the suitor by an independent application. While it stands, an action of trespass cannot be maintained against the corporation any more than by force of an analogous provision, it can be maintained against a magistrate for acts done under a conviction made by him, though illegal on its face, without, or in excess of his jurisdiction, until the conviction has been quashed.

I fail to see the force of the argument that, as the time within which a motion to quash may be made is limited, a person may have no remedy if the by-law is not put in force until after that time. It is only the remedy for acts done under the by-law which is interfered with, and it by no means follows that the by-law becomes unimpeachable by the laches of the party. I apprehend that even after that time the corporation might be restrained from enforcing it, as was done in the case of *Alexander v. Township of Howard*, 14 O. R. 22.

I do not propose to refer to the cases at length, as the learned Chief Justice has done so in the judgment which has just been delivered by him. I rely on *Carmichael v. Slater*, 9 C. P. 423; *Wilson v. County of Middlesex*, 18 U. C. R. 348; *Smith v. City of Toronto*, 11 C. P. 200; *Black v. White*, 18 U. C. R. 362.

Judgment.

OSLER

J. A.

The case of *Dennis v. Hughes*, 8 U. C. R. 444, is distinguishable. It was an action of trespass, and the by-law which the defendants relied on—a by-law to open a road—had not been quashed. But, as the Court points out, the by-law was so framed as to afford no certain warrant for opening a road over the *locus in quo*, or any where else, and merely professed to establish as a road some line which was not shewn to have been ascertained. It was no more than a by-law to open a road generally, and no road being ascertained in or defined by it, there was nothing to which it could be applied; whereas in our case the *locus* is identified by, and specified in, the by-law and declared to be a public road. The case of *McMullen v. Township of Caradoc*, 22 C. P. 356, does not (with submission) justify the view which has been taken of it, and is, on the contrary, an authority for saying that the by-law, if it is to be treated as a by-law for opening the original allowance, ought to have been quashed before action, so far as it enacts that the road is on the south side of Brown's line. The *ratio decidendi* of that case must be looked at, and it is clear that the Court intended to quash so much of the by-law (as, for the same reason, they had already quashed a former by-law of the defendants for opening the same road) as declared that the road as described by metes and bounds was the road to be opened.

“I agree,” says the Chief Justice, “that we should not allow any part of the by-law to stand which declares that the particular metes and bounds there given shall constitute the true original allowance.” And per Gwynne, J., “The by-law appears to partake of the vice of the former one, in so far as it purports to declare and enact that the side road, as set out by metes and bounds, and described in the by-

Judgment.

OSLER
J.A.

law, shall be and is thereby declared to be the side road." The council was evidently under the impression that they left the by-law simply as one to open the original allowance with a mere description of the boundaries which might or might not be correct, but which were not declared and enacted to be the limits of the road. So far, however, as the Court interfered they did so by quashing that part of the by-law which might stand in the way of the applicant in the event of its being necessary for him to bring an action for anything done under the by-law.

I refer also to the case of *Mill v. Hawker*, L. R. 9 Exch. 309 ; L. R. 10 Exch. 92, which in view of the express enactment of section 340 appears to me to have a bearing in favour of the officer acting under the by-law.

With regard to the other important question in the case, namely, whether the road was in fact laid out on the south side of Brown's line, where it has always, in great part, been located and travelled, I have made a careful examination of the instructions, field notes, and documents bearing upon it, and agree for the reasons stated in the judgment which my brother MACLENNAN is about to deliver, that the road in question is on the south side of the line. On both grounds, therefore, (1) that the by-law should have been quashed before action, and (2) that the land, on which the alleged trespasses were committed, was not the plaintiff's, I am of opinion that the defendants are entitled to succeed, and that the appeals should be allowed, and the actions dismissed.

I omitted to notice the plaintiff's contention that he was entitled to recover under the provisions of the Tree Planting Act, R. S. O. 1877, ch. 187 ; and also ch. 174, sec. 454, subsec. 16 ; *Douglas v. Fox*, 31 C. P. 140. The contention was but faintly urged, and I think it fails, because it is not consistent with the position taken by the plaintiff at the outset, in denying that the land in question was a highway at all, and that the defendants had the right to construct and lay out a travelled road on any part of it. I doubt, moreover, whether the Act applies at all, except to the case

of trees on the side of a *travelled* highway, or to control the discretion of the council as to what part of the highway they will construct and lay out in the first instance as that which is to be used as the travelled road.

Judgment.

OSLER
J. A.

MACLENNAN J. A. :—

[The learned Judge after discussing the evidence and coming to the conclusion that the road allowance lay to the south of Brown's line, continued :]

On the question of the necessity for quashing the by-law of the county council I agree with the judgment just delivered by the learned Chief Justice, to which I am unable usefully to add anything.

I am, therefore, for these reasons, of opinion that the appeals should be allowed in both cases, and that the actions should be dismissed with costs.

Appeals allowed with costs.

THE LONDON MUTUAL FIRE INSURANCE COMPANY

V.

JACOB AND GORDON.

Solicitor—Lien—Funds recovered in action—Security for costs to be incurred.

Actions were brought by one G. against two insurance companies to recover losses occasioned by a fire. The actions were tried together, and in one the plaintiff recovered judgment, but the other was dismissed with costs. The defendants acted as G.'s solicitors in each action. By a special agreement, upon the faith of which each action was carried on, the solicitors were to have a lien upon the amount recovered in each action for the costs of that action and of the other.

The insurance company against whom the unsuccessful action had been brought, attached the moneys due to G. by the company against whom G. had succeeded, and the defendants claimed a lien on the judgment which had been thus attached for all their costs in both actions.

Held, reversing the decision of ARMOUR, C. J., that so far as the lien claimed by the defendants depended upon the agreement it must fail, because that agreement was nothing more than an agreement to secure costs to be incurred in the future, and the general proposition that a solicitor will not be permitted to take a security for costs to be incurred, is established beyond the reach of controversy.

Held, also, that the solicitors had no lien for the costs of the unsuccessful action upon the fund recovered in the other, that fund not having been recovered or preserved by means of the costs incurred in the action which was lost, and the two actions not being so intimately connected as to be regarded as one.

Statement.

THIS was an appeal by the plaintiffs from the judgment of ARMOUR, C.J., upon the trial of an issue arising under the following circumstances.

One John Graham brought an action upon a policy of fire insurance against the London Mutual Fire Insurance Company.

He also brought another upon another policy against the Ontario Mutual Fire Insurance Company.

The losses sued for arose out of the same fire.

The now defendants were his solicitors in both actions.

In the former he failed, and the now plaintiffs recovered judgment against him for \$366.60, for their costs of defence.

In the action against the Ontario Mutual he succeeded, and obtained judgment against them for \$702, and costs.

Afterwards on the 14th March, 1887, he assigned this judgment to the defendants in trust to secure their costs

in both actions, "and for the benefit of Messrs. Powley & White and certain other persons and firms who have received and will receive orders from said Graham, but only to the extent of the balance left in said Jacob & Gordon's hands." Statement.

On the 15th March, 1887, an attaching order and summons was obtained by the London Mutual, attaching all debts due from the Ontario Mutual to Graham, which was served on the garnishees on the 18th March.

The defendants claimed a lien on the judgment which had thus been attached for all their costs in both actions. They also claimed as assignees of the judgment. Their right to a lien for the costs of the action in which the judgment was recovered was conceded, and an issue was directed to try the question whether the claim of the London Mutual as attaching creditors was entitled to prevail against the solicitors' claim under the assignment, or for a lien for costs of the action in which Graham had been unsuccessful.

The learned Chief Justice, by whom the issue was tried without a jury, held that the assignment was void under the Assignments and Preferences Act, as Graham was insolvent when he made it. He thought that the two suits brought by Graham against the two companies having been brought by reason of the same fire, having both been tried before him as one suit, and the amount to be recovered in each depending by the terms of the policies upon the amount to be recovered in the other, they were so much one suit that the solicitors would have a lien on the amount recovered in both for the costs of both, and on the amount recovered in either for the costs in it and of the other. He did not, however, decide or rest the case upon that point, as he found that by a special agreement, upon the faith of which both suits were carried on, the solicitors were to have a lien upon the amount recovered in either suit for the costs of it and of the other, and he therefore found that they had a lien upon the amount recovered by Graham against the Ontario Company for their costs in the suit against the London Company.

Statement.

The plaintiffs appealed, and the appeal came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 16th of May, 1889.

Macmillan, for the appellants.

Jacob, one of the respondents, in person.

June 29th, 1889. The judgment of the Court was delivered by

OSLER J.A. :—

I think the appellants are entitled to succeed.

So far as the lien claimed by the respondents depends upon the agreement found by the learned Chief Justice, it must fail, because that agreement was nothing more than an agreement to secure costs to be incurred in the future. "The general proposition, that a solicitor will not be permitted to take a security for costs to be incurred, is established beyond the reach of controversy": *Uppington v. Bullen*, 2 Dr. & War. 184.

It cannot be necessary to refer at length to the authorities. They were fully examined and applied in the cases of *Hope v. Caldwell*, 21 C. P. 241; *Robertson v. Furness*, 43 U. C. R. 143. See also *Robertson v. Caldwell*, 31 U. C. R. 402; *Atkinson v. Gallagher*, 23 Gr. 201; *Galbraith v. Irving*, 8 O. R. 751.

In England the law in this respect is now otherwise by statute. See 33-34 Vic. ch. 28, sec. 16, (Imp.); 44-45 Vic. ch. 44, sec. 9, (Imp.); 49 Vic. ch. 20, secs. 21, 22, 23, (O.)

Then how does the solicitors' right stand, apart from the agreement?

The rule is that the lien upon the fund realized in the suit is confined to the costs of that suit, that is, to the costs of recovering that very fund. "The contract of the solicitor gives him a personal remedy against the party who retains him, and nothing more, except in the special

case of the costs of a suit by which a fund is realized, and then his right is limited to the costs of that particular suit": *Hall v. Laver*, 1 Hare 571; and see *Bozon v. Bolland*, 4 My. & Cr. 354; *Lucas v. Peacock*, 9 Beav. 177; *Davidson v. Douglas*, 15 Gr. 347; *Canadian Bank of Commerce v. Crouch*, 8 P. R. 437; Stokes on Attorneys' Liens, p. 138.

Judgment.

 OSLER
J.A.

The rule is the same under the Attorneys and Solicitors' Act (Imp.) 23-24 Vic. ch. 127, which enables a solicitor to obtain a charging order for his costs of suit upon property recovered or preserved through his instrumentality. The right is limited to the costs of the particular suit, matter, or proceeding in which the fund was recovered: *Ex parte Thomson*, 3 L. T. N. S. 317; see also *Haymes v. Cooper*, 10 Jur. N. S. 303.

I cannot agree that the actions against the two insurance companies were so connected with each other in their cause, institution, or progress as to form but one suit for the purpose of giving the solicitors a lien for the costs of the unsuccessful one, upon the fund recovered in the other.

They were in themselves entirely distinct. Nothing which was done in the suit against the London Company, where nothing was recovered, promoted the success of that against the Ontario Company; in other words, the fund in question was not recovered or preserved by means of the costs incurred in the suit which was lost.

"Where the proceeding in which the fund is actually recovered is so intimately connected with another proceeding that the two may be regarded as forming one cause, the charging-lien will cover the costs of such other proceeding": Stokes on Attorneys' Liens, p. 139.

The illustration is that the lien on the debt recovered in the cause extends to costs of proceedings in error which may be considered parcel of the cause.

The right does not depend upon the contract or retainer, but as Wood, V. C., says in *Simpson v. Prothero*, 26 L. J. Ch. 671, upon the principle that the Court considers how the fund was obtained, "and if you find that it has been

Judgment.

OSLER
J.A.

recovered by the exertions of the party claiming the lien, it is but right he should have his reward out of the fruit of his exertions." This case is cited in the judgment below, but does not help the defendants. There the solicitors were declared entitled to a lien for their costs of the action at law, and also for those of the suit in equity between the parties, but this was expressly on the ground that the latter was in effect the defence to the former, and that the Court of Equity, considering it had jurisdiction, had taken the whole matter into its own hands and awarded the damages which the defendant in the equity suit was seeking to enforce at law.

I refer on this point to the cases of *Hall v. Laver*, 1 Hare 571; *Wilson v. Round*, 10 Jur. N. S. 34; *Pritchard v. Roberts*, L. R. 17 Eq. 222.

It is hardly necessary to say that nothing can be made out of the assignment; it is void under the Act as a preferential assignment, and connected with it there would have been the further difficulty that if the agreement for the lien could have been supported against the objection I have stated, it would have fallen with the assignment, as the latter was made in pursuance of it, and for the purpose of carrying it out, and is the only thing which now represents it.

The result is, that there is no ground on which the defendants are entitled to intercept the operation of the attaching order, and that the appeal must be allowed.

Simpson v. Lamb, 7 E. & B. 84; and *Anderson v. Rudcliffe*, 1 E. B. & E. 806, do not apply.

Query:—If Graham had without objection sued both the insurance companies in one action under Rules 91 and 92, Ontario Judicature Act, the question probably would not have arisen.

Appeal allowed with costs.

IN THE MATTER OF THE BOLT AND IRON COMPANY.

LIVINGSTONE'S CASE.

Company—Managing director—Remuneration of officer of company—Breach of trust—Set-off—Winding-up proceedings—Jurisdiction of Master—Assignment of claim after winding-up order—R. S. C. ch. 129, sec. 77, sub-sec. 2, secs. 83, 86, 87, 93.

THIS was an appeal by Livingstone from the judgment **Statement.** of BOYD, C., reported 14 O. R. 211, and came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.) on the 16th of May, 1889.

Moss, Q. C., for the appellant.

Bain, Q. C., for the respondents.

June 29th, 1889. The Court dismissed the appeal with **Judgment.** costs, unanimously agreeing with, and fully adopting, the judgment of the learned Chancellor.

BOND V. CONMEE.

Malicious arrest—Justices of the Peace—Conviction for having liquors for sale near public works—Destruction of liquors—Necessity for quashing conviction before bringing action—Unsealed conviction returned on certiorari—Power to put in sealed conviction after such return—Notice of action—Statement of cause of action—Service of notice—Order of Justices—Necessity for quashing order before bringing action—Venue—New trial—R. S. O. 1877, ch. 32, secs. 2, 6, and 7; R. S. O. 1887, ch. 35, secs. 2, 6, and 7; R. S. O. 1877, ch. 73; R. S. O. 1887, ch. 73.

The defendant C. and others were contractors employed in constructing a portion of the line of the Canadian Pacific Railway on the north shore of Lake Superior, 50 miles north of the mouth of the Michipicoten River, where there is a post of the Hudson Bay Company and a small collection of houses and stores known by the name of the village of Michipicoten River. At this place the defendant C. and his co-contractors had their head-quarters, and had constructed a supply road to the line of the railway where their operations were being carried on. The plaintiff brought to this village in a small sailing vessel a quantity of intoxicating liquors, intending to sell them there. The defendant C. and his co-defendant B., who were justices of the peace, having jurisdiction in the district of Algoma, assuming to act under ch. 32 R. S. O. (1877) "An Act respecting the Sale of Intoxicating Liquors near Public Works," caused the liquors to be seized and destroyed, and the plaintiff to be arrested, fined, and imprisoned.

Held, that this was a village within the meaning of R. S. O. ch. 32, sec. 1, and therefore that the prohibition contained in the Act did not apply and that the justices had no jurisdiction.

The plaintiff was discharged upon a writ of *habeas corpus*, the justices having returned to the *certiorari* issued in aid of the *habeas corpus*, a paper purporting to be the conviction signed by them but not under their seal. The conviction was not quashed.

Held, that after the return to the *certiorari*, a new conviction could not be returned, and that as the conviction returned was not sealed, it was a nullity and need not be quashed before an action was brought.

The notice of action stated that one month after the service of the notice, an action would be brought for malicious arrest, etc., and for the malicious, etc. destruction of goods, and for damages for loss of time and injury to business, and for the recovery of costs and expenses, etc., "same having been committed by you against me in the month of May last at said village of Michipicoten River, and at the town of Port Arthur."

The notice was served on the defendant B. personally, and was served on the agent of the defendant C. at the head office of the defendant C. at Michipicoten River, and a copy was also left for the defendant C. at his place of residence at Port Arthur and another copy was served on his solicitors. The defendant C. admitted that he had seen a copy of the notice but it was not shown at what time or place he had seen it.

Held, that the notice and service were sufficient.

Seem, the omission to give notice of action must be pleaded or the section which requires it, referred to in the plea of "not guilty by statute."

The venue in the action was laid at the city of Toronto, and subsequently, by consent, an order was made, striking out the jury notice and directing the trial to take place at Port Arthur.

Held, that in view of this order, the objection that the venue was improperly laid could not be sustained.

The order for the destruction of the liquors was not produced, but the person who destroyed the liquors stated, without objection, that he had received a written order to destroy the liquors, signed by both justices, and that he had returned the order to them. This order had not been quashed.

Held, that the defendants were entitled to say that the existence of such an order was proved, but that the order for the destruction and the adjudication of forfeiture were two different things, and that in order to obtain protection, the order or adjudication of forfeiture should have been proved, and that it was not necessary to quash a mere order for destruction.

The order spoken of in R. S. O. (1877) ch. 73, sec. 4, is an order in the nature of a conviction, i. e., an original adjudication by the magistrate upon some matter brought before him by charge, complaint, conviction, or otherwise, and not an order for the purpose of carrying out or enforcing such adjudication.

Upon an application to the Divisional Court for a new trial, the defendants produced a document, which, it was alleged, was the written order under which the liquor was destroyed.

Held, that as there was no explanation why this order was not produced at the trial, it was too late to produce it now, and a new trial could not be granted even assuming that the order contained the adjudication as to the forfeiture of the liquors.

Judgment of the Common Pleas Division affirmed.

THIS was an appeal from the judgment of the Common Pleas Division.

The action was brought to recover damages for malicious prosecution and false imprisonment, and for the illegal destruction of liquors belonging to the plaintiff.

The defendant Conmee and others were contractors engaged in constructing a section of the line of the Canadian Pacific Railway on the north shore of Lake Superior, fifty miles north of the mouth of the Michipicoten River, where there is a post of the Hudson Bay Company, and a small collection of stores and houses, known by the name of the village of Michipicoten River. Here the defendant Conmee and his co-contractors had their head-quarters, and had constructed from this place to the railway line a road, over which their supplies and materials were forwarded. The plaintiff brought to the village of Michipicoten River in a small sailing vessel called the "North Star," a quantity of intoxicating liquor, intending to sell it there.

The defendants Conmee and Bell were justices of the peace, having jurisdiction in Algoma, and the former, acting on an information charging that the plaintiff had a cargo of intoxicating liquors on board a schooner at Michi-

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picoten River, "for the purposes of sale on or near the works of the Canadian Pacific Railway, contrary to law," issued a warrant upon which the plaintiff was arrested, and subsequently tried and convicted by and before both the defendants.

The conviction purported to be made under the R. S. O. 1877, ch. 32, sec. 2, and the plaintiff was fined \$50, and ordered to be imprisoned for six months. The plaintiff was taken to Port Arthur, and after remaining in gaol about six weeks was discharged under a writ of *habeas corpus*.

The plaintiff's stock of liquors was destroyed under the direction of the defendants, and no order for the destruction was actually produced at the trial. The person who destroyed the liquors stated, however, and his evidence was not objected to, that an order for their destruction, signed by both justices, had been received by him, and that he had returned it to them.

A writ of *certiorari*, directed to the justices, had issued in the *habeas corpus* proceedings, and a paper purporting to be a conviction, but not under seal, was returned thereunder.

Neither the conviction, nor the order for the destruction of the liquors, was formally quashed.

Before action the following notice of action was given:

To James Conmee and P. W. Bell, Justices of the Peace in and for the District of Algoma.

Take notice that in one month after the service of this notice on you, I, William Allan Bond, of the village of Michipicoten River, trader, intend to commence and prosecute an action for damages against you in the Queen's Bench Division of the High Court of Justice for Ontario, for malicious, illegal, and wrongful arrest, conviction, and imprisonment of me the said William Allan Bond, without any reasonable or probable cause, and for the malicious, illegal, and wrongful destruction of my goods and chattels, and for damages for my loss of time and injury to my business; and for the recovery of the costs and expenses which I have incurred by reason of such malicious, illegal, and wrongful arrest, the same having been committed by you against me in the month of May last, 1884, at the village of Michipicoten River, and in the town of Port Arthur.

This notice was served on the defendant Bell personally, and a copy was served on the agent of the defendant

Conmee at Michipicoten River, another copy was left at Statement.
Conmee's residence in Port Arthur, and another copy was served on his solicitors. At the trial, the defendant Conmee admitted that he had seen a copy of the notice but it was not shown at what time or place he had seen it.

The venue in the action was laid at Toronto, but subsequently, by consent, was changed to Port Arthur, where the trial took place.

The plaintiff recovered judgment for \$1,600, and this judgment was affirmed by the Divisional Court. See 15 O. R. 716.

The defendants appealed, and the appeal came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.), on the 17th and 20th of May, 1889.

Osler, Q.C., and A. W. Aytoun-Finlay, for the appellants. No proper service of notice of action has been shown: *Vaux v. Vollans*, 1 N. & M. 307; *Hanns v. Johnston*, 3 O. R. 100; *Lawrenson v. Hill*, 10 Ir. C. L. 498. The notice itself is insufficient. Neither the act complained of nor the place where the act was committed is properly defined. In the notice the plaintiff complains of several acts at two places, while the particular cause of action and the particular locality of the injury must be specifically shewn: *Forbes v. Lloyd*, 10 Ir. R. C. L. 552; *Taylor v. Nesfield*, 3 E. & B. 724; *Madden v. Shewer*, 2 U. C. R. 115; *Parkyn v. Staples*, 19 C. P. 240. The venue is laid at Toronto, but there is no proof that the cause of action arose there, and the plaintiff cannot recover: R. S. O. (1887), ch. 73, sec. 16. *Legacy v. Pitcher*, 10 O. R. 620, is wrongly decided. Where there is an express statutory provision the rule in the Judicature Act cannot take effect, and the statutory provision as to venue has, since that decision, been re-enacted in the new revision. The decision in that case, moreover, is inconsistent with *Arscott v. Lilley*, 14 A. R. 283, where the principle in question was the same. The conviction not having been quashed, the

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action cannot be maintained. The learned Judge and the Divisional Court have wrongly held that the return to the writ of *certiorari* precluded the defendants from putting in a properly sealed conviction. There is a distinction between a *certiorari* in aid of a writ of *habeas corpus* and a *certiorari* to remove a conviction for the purpose of quashing it. The first is merely for the purpose of bringing papers before the Judge who is examining into the commitment, and the conviction does not become a record of the Court, and no return is filed, and there is nothing to prevent a new conviction being made out if the first conviction has been brought up on *certiorari* in this way. If, however, the conviction is removed into the higher Court for the purpose of being quashed, then it ceases to be in the magistrates' hands, and cannot after that time be amended by them. This is a case of the former kind, and the defendants should have been allowed to put in an amended conviction. At any rate the actual conviction itself still stands, and has been proved, and it is only the technical formal record of it that is wanting. The arrest and imprisonment were made pursuant to the conviction, and not to the mere record of it, and as the conviction stands, the action cannot be maintained. There was jurisdiction to destroy the liquors in question, as the road from the village of Michipicoten River to the railway was a public work within the meaning of the Act, though not part of the actual railway line. An order for the destruction of liquors does not depend upon the validity of the conviction, and even if the conviction is bad, still the order having been validly made must be set aside before any complaint can be made in respect to that destruction: Paley on Convictions, 6th ed., p. 171. At all events there should be a new trial.

G. T. Blackstock, for the respondent. The *certiorari* issued in this case was not a *certiorari* in aid, but the ordinary writ of *certiorari* to the magistrates, and the conviction having been returned by them to the Court pursuant to that writ could not after that be amended. The conviction as returned was not sealed, and clearly was

utterly bad, and it was not necessary to quash it. The Argument notice of action was sufficient. All the necessary information was given, and there was nothing in the notice to mislead. The plaintiff suffered injury of the kinds mentioned in the notice at both the places mentioned in the notice, and no fuller or more specific information could possibly be given, and objection cannot be taken to the form of the notice: *Green v. Hutt*, 51 L. J. Q. B. 640; *Gimbert v. Coyney*, McClel. & Y. 469, at p. 480. The notice was properly served, and proof of service was properly given, and the defendant Conmee admits that he received notice. The question of venue was not raised at the trial, nor in the notice of motion to the Divisional Court, and cannot be raised now. At any rate local venue has been abolished by the Judicature Act, and the trial took place in the proper district: *Legacy v. Pitcher*, 10 O. R. 620. In this case the justices were not entitled to any notice at all as they acted in bad faith and without jurisdiction: *Agnew v. Jobson*, 13 Cox C. C. 625; *Griffith v. Taylor*, 2 C. P. D.

194. The order for the destruction of the liquors was not proved, and at any rate such an order is not one requiring to be quashed: R. S. O. (1887), ch. 73, secs. 3 and 4. The orders referred to are orders in the nature of adjudications, upon which a warrant of distress can issue. The order in this case was made wholly without jurisdiction, as the right to destroy liquors only arises where the owner is unknown, or does not appear after summons. If he appears he can be fined only.

A. W. Aytoun-Finlay, in reply.

June 29th, 1889. HAGARTY C. J. O.:—

I am inclined to hold that the notice of action although most inartificially drawn may be upheld as sufficient in substance. Apart from the decisions that are in the books, from *Martins v. Upcher*, 3 Q. B. 662, downwards, there can be no reasonable doubt, but the defendants were notified in such terms that it was impossible for them to be in any

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way misled, or that they must not have been fully aware that the arrest and destruction of the plaintiff's property at Michipicoten, and his commitment to the gaol at Port Arthur, and his imprisonment there, formed the subject matter of the action. The time might have been more distinctly stated than as "in the month of May last, 1884," and the place "at the village of Michipicoten River, and in the town of Port Arthur." The arrest and imprisonment began at Michipicoten, and was ended in Port Arthur gaol, lasting for five or six weeks. I specially refer to *Green v. Hutt*, 51 L. J. Q. B. 640, and to *Lungford v. Kirkpatrick*, 2 A. R. 513, in this Court. There was, in the latter case, a mistake as to the exact date, and of the lot on which the seizure was made. The late Chief Justice Moss reviews the decisions. He says (p. 518): "The statute requires that the cause of action shall be clearly and explicitly stated, and with that requirement the Courts do not assume to dispense. But where such reasonable particularity is used as sufficiently to identify the act or acts complained of, there is a compliance with the language and spirit of the enactment." As to the point as to the lot where the seizure was made, he adds (p. 519): "It would be a cruel refinement of an enactment, which only requires the cause of action to be clearly and explicitly stated, to give effect to this objection."

I think the course of modern decisions has been to construe the notice of action not on the special demurrer system that once prevailed as to pleading, but in a more liberal and common sense interpretation of the true requirements of the statute. I hold the notice sufficient.

Then, as to its service. The learned Chief Justice at the trial found as a fact that "defendant Conmee was duly and in due time served with the notice of action." I cannot say that he was not warranted in so finding. There can be no moral doubt as to the fact, confused as the evidence is on the precise point.

At the close of the plaintiff's case, the defendants formally made several objections (*inter alia*) as to the sufficiency of the notice of action, but nothing as to its service.

They had previously refused to admit service, and objected that it was not properly proved.

Then the defence was entered on. After some evidence in reply, Mr. Blackstock asked defendant Conmee:

Mr. Blackstock to *Mr. Conmee*—(re-called)—Did you receive one of the notices of action? A. At what time?

Q. At any time? A. Oh, I seen it.

Mr. Lewis—That would not be sufficient; you must show that he got it within a certain time.

Mr. Blackstock—The notice was given in time.

HIS LORDSHIP—You had better clear it up, as a good deal may turn upon that.

Mr. Blackstock—We prove now that the notice was first left at his office.

HIS LORDSHIP—That may or may not be a good service.

Mr. Blackstock—That is a question of law. There is that, and there is the evidence that one was left with his general solicitor, and another at his house, three places altogether, and he says that one of them came to him, and he got it.

Argument was next heard, his Lordship reserving judgment.

On the motion for new trial all the grounds are fully stated, but no special reference is made to the service of notices of action.

I think there was evidence on which a Judge or jury could properly find that notice of action was given in time. The defendant was a justice of the peace for Algoma. His usual place of residence with his family was at Port Arthur in another district; that of Thunder Bay. He had very extensive contracts in Algoma District, with hundreds of men employed, and his office, or head-quarters as it was called, was at Michipicoten, with Mr. Rathbone as his chief manager or agent. He was much up there. The plaintiff swore he gave the notice of action for the defendant to Mr. Rathbone there; that the defendant came there an hour or two after he so left it with Rathbone, and in the morning Rathbone told him he had given it to the defendant. The

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latter was present at the trial. No objection was taken to this statement made as we may assume in his presence and hearing. All the proceedings of this magistrate took place at Michipicoten where he must have been frequently living and doing business. The learned Chief Justice very probably considered that service there would be sufficient.

In a case of *Mason v. Bibby*, 2 H. & C. 881, it was held under a statute requiring notice to be served personally or by delivering the same to some inmate of the owner's or occupier's place of abode, that service of notice on a clerk of an owner at his place of business was sufficient; his place of residence was elsewhere.

Pollock, C. B., considered that a place of business is a place of abode.

Martin, B., "I think a man may have two places of abode, one where he abides at night, and another where he abides by day. The respondent resides some distance from Liverpool, and abides during the day at his office in Liverpool, where he would be seen on matters of business."

Pigott, B., considered that under that Act "place of abode," included "place of business."

In *Blackwell v. England*, 8 E. & B. 541, the question and the authorities are fully discussed, and reference is made to *Haslope v. Thorne*, 1 M. & S. 103, where Lord Ellenborough and the full Court held that "the words 'place of abode' did not necessarily mean the place where the defendant sleeps."

The principle on which the Courts construe the words abode and residence is discussed in *Blackwell v. England*. *Attenborough v. Thompson*, 2 H. & N. 559, may also be noticed as to the words "residence" and "place of abode."

Wharton's Law Dictionary defines abode: "In law it is used in different senses, to denote the place of a man's residence or business, temporary or permanent. * * 'Abode' seems larger and looser in its import than 'residence,' which in strictness means the place where a man lives, i. e., where he sleeps or is at home."

I am satisfied with the Chief Justice's finding as to notice.

The Divisional Court disposed of this objection on the ground that the defence was "not guilty by statute : R. S. O. (1877) ch. 73, sec. 11." It is under section 10 that the notice of action is required. I refer to the judgment of Sir Thomas Galt, for the full statement of the reasons for this decision.

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I do not further discuss this question as my judgment does not depend on it. But the non-reference to the 10th section of the statute as to notice strongly supports the inference I draw from the evidence at the trial that the service of this notice was never intended to be denied, and that the defendants, with the fullest opportunity of denying it, never ventured so to do.

Then as to venue. It was first laid in Toronto. After this, in November, 1884, an order was obtained by consent changing the venue to Port Arthur. At Port Arthur, in July, 1886, the case was dismissed for non-appearance of the plaintiff before O'Connor, J., but was afterwards reinstated by the Court.

I think after the consent of defendants to change the venue to Port Arthur, where the trial ultimately took place, and where a large portion of the grievances for which reparation is sought, actually took place, we need not further discuss this point.

As to the objection that the learned Chief Justice would not receive a conviction then drawn or to be drawn I think the Common Pleas Division has rightly dealt with that point. The defendants Bell and Conmee professed to convict the plaintiff, and returned to the *certiorari* a document professing to be a conviction, but not valid as such from the absence of their seals. At the trial the defendant Bell was not present, and could not have joined in drawing up a legal record of the proceedings of the Court at which both the defendants presided. There was in fact no conviction whatever at any time in existence. The plaintiff could not have had a conviction quashed that never existed. He had the right to assume that the defendants rightly returned to the *certiorari* a true record of all

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they did. His action if otherwise well founded should not be barred or defeated as was suggested at the trial.

The case of *Chaney v. Payne*, 1 Q. B. 712, seems much in point.

I do not think we can properly differ from the decision at the trial, and in the Divisional Court "that the place where these transactions occurred was not within the provisions of either of the Acts." (R. S. O. ch. 32; R. S. C. ch. 151).

If the whole proceeding as to the seizure and destruction of the liquors was thus unwarranted by the statute law, it was of course wholly beyond the jurisdiction of the defendants, or either of them.

But even if Michipicoten were actually within the statute, I still think the defendants are liable in trespass, as I see no jurisdiction warranting the imprisonment of plaintiff, or seizure of his goods.

If the defendants sought protection on this point of the case under the order for the seizing or destroying of the liquors, I think the order should have been produced by them, and I fully agree with the reasons for now refusing relief or indulgence.

The evidence to connect the defendants with the destruction of the liquor merely went to shew there was their order in writing therefor, which was stated without objection.

Such an order could not, in my judgment, be an order requiring to be quashed. I think, as my brother Osler will more fully shew, that it must be an order of adjudication, or declaration of forfeiture, which would come under the statute. Any order of that kind was in the defendants' possession, and it was for them to produce it, and shew its nature, and claim any protection it might afford.

The affidavit of the defendants gives not the slightest excuse or reason for not producing it or referring to it at the trial. I fully agree that it should not now be considered as a ground of interference or indulgence.

The whole proceedings in this case were lamentably

deficient in judicial propriety. Making every allowance for the wild character of that section of the country, and the necessity for prompt action in the laudable endeavour to keep intoxicating liquor from those engaged in the Public Works, it is impossible not to regret that so slight regard has been paid to the proper discharge of magisterial functions.

Judgment.

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C.J.O.

OSLER J. A. :—

I think this action is to be regarded as one coming within section 2 of the Justices Protection Act, an action of trespass and false imprisonment, as it was formerly called, for acts done by the defendants in a matter in which as justices they had by law no jurisdiction. It is not an action on the case for maliciously and without reasonable and probable cause doing some act in the execution of their duty as justices in respect of matters within their jurisdiction. We may not be able to infer so much from the statement of claim alone, but looking at the whole course of the proceedings at the trial, before the Divisional Court, and on this appeal, we must hold the action to be one brought under the second and not under the first section. The learned Judge at the trial so treated it, for there are no findings to justify a recovery under the latter section.

The proceedings against the plaintiff which gave rise to the action were taken under chapter 32 of the R. S.O.(1877). "An Act respecting the Sale of Intoxicating Liquors near Public Works." The first section of this Act enacts that no person shall barter, sell, exchange, or dispose of, any intoxicating liquor, nor expose, keep, or have in his possession for sale any such liquor "at any place not included within the limits of any City, incorporated or other Town or Village, and being within three miles of the line of any railway, canal, or other Public Work in progress of construction, whether such work be constructed by the Government of Canada or of this Province, or by any incorporated Company, or by private enterprise."

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Nothing turns upon sub-section 2, for even if the ' work ' was proclaimed, as we were told on the argument, under the authority of that sub-section, that was not done until all the proceedings now called in question had been taken, nor did the defendants attempt to support their proceedings otherwise than under that part of the section I have quoted.

The first question is, whether the village of Michipicoten River was a place within the meaning of the Act within which intoxicating liquor was by the Act prohibited to be sold, or kept for sale, for it is mainly upon this point that the jurisdiction of the defendants depends. The learned Judge who tried the case was of opinion that it was not such a place, but whether, because it was a village, or because the road was not a public work within the meaning of the Act, or because the place, if not a village, was yet not within three miles of any part of the road which was in progress of construction he has not told us.

The construction of this and of other sections of the Act is not free from difficulty. It seems to me not necessary to determine whether such a road as that from Michipicoten to the Canadian Pacific Railway line was a public work within the meaning of the Act; no doubt it was a mere temporary road, or supply road, but it was being made in connection with and for the purpose of the construction of the railway line, and the danger intended to be guarded against by the prohibition is as great in the case of one kind of road as the other. For the purposes of the case we may assume that this supply road was a part of the public work which Conmee and others were constructing, but then the further questions arise whether Michipicoten is a village within the meaning of the Act, for if it is, there is no prohibition, and if not, whether the place at which liquor is forbidden to be sold means any place which is within three miles of the line of the road, or merely three miles from that part of it which happens to be in progress of construction.

Without determining the latter question, I think we

must hold, as the learned Judge may have held, that Michipicoten River Village was a village within the Act, although not incorporated. The words are : "Any place not included within the limits of any City, incorporated or other Town or Village." The words "or other," are senseless as applied to city or town, since the latter can in this country have no existence as such unless incorporated. But the Municipal Act recognizes three classes of villages, viz., incorporated, police, and unincorporated villages : R. S. O. (1887), ch. 184, secs. 9 and 638 ; Harrison's Mun. Man. 4th ed., p. 574, note (b) ; the latter answering, it may be assumed, to the definition of the English vill or village, as "a neighbourhood of many mansions or collection of many neighbours." What the Legislature meant to prevent was the taking of liquor to some sparsely populated district near a railway where the navvies or labourers might be secretly supplied with it, and where, except for that purpose, there was no use for it. This, I think, is to be inferred from the provisions in section 1, that no person shall "obtain or receive a license to sell any intoxicating liquor at any such place as aforesaid, and any such license if granted shall be null." It can hardly have been intended to prohibit the granting of a license within the limits, undefined as they may be, of an unincorporated village which may contain a population of 700 or 800 inhabitants.

If this be the proper construction of the Act, the defendants were acting in all that they did without jurisdiction, and are consequently liable to be sued in such an action as is mentioned in section 2 of the Justices Protection Act.

It is, nevertheless, to be assumed that they were acting in the execution of their office within the meaning of section 9 of that Act, as the learned trial Judge has not found that they were acting colourably, or without a *bond fide* belief of their authority. They are, therefore, entitled to the protection of the Act as regards notice of action, and in other respects : *Hazeldine v. Grove*, 3 Q. B. 997 ; *Kirby v. Simpson*, 10 Exch. 358.

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Section 6 of the Act first referred to, ch 32, R. S. O. (1877), enacts that if three voters of the municipality within which the complaint is made, make oath before a justice of the peace that they believe that any intoxicating liquor intended for sale in contravention of the Act is kept or deposited in any steamboat, &c., on any river, lake, or water adjoining any place within which such liquor is by the Act forbidden to be sold, the justice shall issue his warrant of search to an officer, who shall search the premises described in the warrant, and if any such liquors are found therein, shall seize the same, and convey them to some proper place of security, and keep them until proper action be had thereon.

Section 7. The owner or keeper of the liquor seized, if he is known to the officer seizing the same, shall be summoned forthwith before the justice by whose warrant it was seized, and if he fails to appear, and (a) it appears to the satisfaction of the justice that the liquor was kept or intended for sale in contravention of the Act it shall be *declared forfeited*, and shall be destroyed by authority of the written order to that effect of the said justice, and in his presence or in that of some one appointed by him to witness the destruction thereof. The fact of destruction is to be attested by such person and the officer upon the back of the order. And the owner shall pay a fine of \$40, or in default be committed to prison for three months.

The second section enacts that any person who in contravention of the Act exposes or keeps for sale or sells any intoxicating liquor shall be liable to a fine of \$20 on the first conviction, \$40 on the second, and on the third and every subsequent conviction to such last mentioned fine and imprisonment for a period not more than six months.

On the 21st of May, 1884, an information was taken before the defendant Conmee by three persons that they believed that the schooner "North Star," in charge of the plaintiff,

(a) "Or," in Revised Statutes of 1887, ch. 35, sec. 7.

‘had a cargo of spirituous and other liquors on board for Michipicoten, for the purpose of sale on or near the works of the Canadian Pacific Railway, contrary to law, and that such would cause serious disturbance.’ Upon this information the defendant Conmee issued a warrant “to apprehend and seize the said vessel, and the said W. A. Bond and any other persons you may find on said vessel, and also to retain all liquors of any kind found thereon together with the said vessel.”

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The plaintiff, though well known to the defendant Conmee and the officer who executed the warrant, was arrested thereon and brought before the defendants who heard the charge, but, instead of convicting and fining him thereon under the 7th section of the Act, convicted him under the 2nd section, and as for a third offence, and not only fined him forty dollars, but ordered him to be imprisoned for six months. There was no evidence whatever that the liquor, or any of it, had been exposed or kept for sale or sold at that time, and the only evidence of any previous conviction was that of the defendant Bell, one of the convicting magistrates, who swore that the plaintiff “was twice previously convicted” before him, not saying for what offence.

A document, purporting to be a conviction, was drawn up and signed by the defendants, but not sealed, and the plaintiff was committed to gaol where he remained for some six weeks until he was discharged upon a writ of *habeas corpus*. The liquor which had been seized was afterwards destroyed in pursuance, it was said, of a written order signed by the defendants.

At the trial the plaintiff obtained judgment for \$1,600, which included damages for the property destroyed, as well as for the personal injuries and imprisonment complained of. The Divisional Court refused to disturb the judgment.

On this appeal, as on the motion against the judgment in the Divisional Court, the questions raised are : (1) as to the proof of the conviction of the plaintiff, and of the order

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for the destruction of his property ; (2) whether the plaintiff can succeed in the absence of proof that the conviction and order were quashed as required by section 4 of the Justices Protection Act; and (3) whether there was sufficient proof of the service of the notice of action upon the defendant Conmee. The due service upon the defendant Bell was admitted.

A further question was argued, viz., whether Port Arthur was the proper venue or place of trial as required by section 11 of the Justices Protection Act, the defendants contending that it should have been laid at Sault Ste. Marie. It appears to me that the consent order, by which the jury notice was struck out and the case ordered to be tried at Port Arthur, gets rid of all difficulty on that score.

It is necessary to note briefly the course taken at the trial. The plaintiff gave evidence of his arrest and imprisonment by the authority, first of the defendant Conmee, and afterwards of both defendants. He proved that the information and depositions, together with the so called conviction, had been returned into the High Court on behalf of the defendants upon a writ of *certiorari* issued in aid of the writ of *habeas corpus* under which he obtained his discharge.

The seizure of the liquor under the warrant issued by the defendant Conmee was also proved, and Donald MacLennan, one of the constables who made the seizure, swore that he afterwards destroyed it. He was asked by the plaintiff's counsel :

Q. Did you destroy this liquor ? A. Yes.

Q. How did you come to do that ? A. I had an order from the magistrates to do that. I think the order was signed by both of them.

Q. What became of the order, do you know ? A. I think the order called for being returned to the magistrates after the destruction of the liquor. It was returned. I am confident the order was returned.

This evidence was given without objection. The order was not called for by the plaintiff's counsel, nor did the

defendants offer to put it in. No other evidence was given either of the order or conviction. Judgment.

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J.A.

It will be convenient to consider at this point the disposition which has been made of this branch of the case, deferring for the present the objections as to the notice of action.

The defendants' counsel moved to dismiss the action on the ground among others that there was no proof that the conviction had been quashed. The learned trial Judge held that this was unnecessary, there being no evidence of any conviction under seal, but suggested that it was not too late even then to make up and put in such a conviction. The defendants' counsel said they would have done so but for the absence of the defendant Bell.

On its being pointed out that the proceedings had been returned upon the *certiorari* the learned Judge observed that the magistrates were *functi officio*, and then counsel said that the real conviction was under seal, and a copy had been returned by mistake. No evidence of this was tendered, nor was any application made to prove it, or to put in a valid conviction at a later stage before judgment.

No point was made at the trial as to the order for the destruction of the liquor not having been quashed, and the learned Judge held that as no valid conviction, and no declaration of forfeiture or written order for destruction of the plaintiff's goods had been proved, the defendants were without any justification, and nothing remained but the question of damages which he assessed, as I have said, at the sum of \$1,600.

I agree with the Courts below that as the defendants, in point of law, proved no such conviction as the statute requires, that is to say a conviction by them as justices under their hands and seals, there was in fact no conviction which the plaintiff was obliged to have quashed on appeal, or on motion to the High Court. I think that point is well decided in the cases of *Haacke v. Adamson*, 14 C. P. 201, and *McDonald v. Stuckey*, 31 U. C. R. 577; see also *Graham v. McArthur*, 25 U. C. R. 478, note (a). The

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defendants chose to return to the writ of *certiorari* merely an unsealed conviction, and even if they could after that have made up one valid in form, (which, for the purpose of defeating this action, I think they could not,) they have not done so, and the case remains in this respect just as it was left at the trial.

Whether if a sealed conviction had been returned upon the *certiorari*, the discharge of the plaintiff upon the *habeas corpus* would have made it unnecessary to quash it, as the learned Chief Justice of the Common Pleas Division intimates in his judgment, is a point which does not here call for decision.

I will only observe that the case of *Chaney v. Payne*, 1 Q. B. 712, which is cited as authority for the proposition, will probably be found not to be of general application in view of the later express statutory requirement, R. S. O. (1877), ch. 73, sec. 4 : *Hunter v. Gilkison*, 7 O. R. 735 ; *Regina v. Bennett*, 3 O. R. 45 ; *Haylock v. Sparke*, 1 E. & B. 471 ; and compare *Gray v. Cookson*, 16 East 12.

Then, as to the order for the destruction of the liquor. What the Act, R. S. O. 1877, ch. 32, (now ch. 35) sec. 7, enacts is, that liquor seized under the provisions of the 6th section, shall, if proved to the satisfaction of the justice to have been kept or intended for sale, "be declared forfeited, with any package in which it is contained, and shall be destroyed by authority of the written order to that effect of the said justice." The adjudication of forfeiture of the liquor, and the written order for its destruction, are two different things. They may perhaps be combined in one instrument, but would not necessarily or properly be so. The former is the judicial adjudication upon the complaint, and like a conviction, must I have no doubt be under the hands and seals of the justices by whom it is made : Summary Convictions Act, R. S. C. ch. 178, sec. 53 ; R. S. O. 1887, ch. 74, sec. 1. The latter is merely their direction and authority for carrying the adjudication into effect, and may be compared to the warrant of distress, or of commitment, issued upon a

conviction, though here the statute requires nothing more than a written order.

I think the defendants are entitled to say that the existence of the order for destruction was proved. The constable said he was acting under such an order, and that it was returned to the magistrates. No objection was made to that statement. But the evidence goes no further. No adjudication of forfeiture was proved, and as the case was presented at the trial, it was certainly not to be assumed in the defendants' favour that there was one, or that the written order which the constable spoke of was anything but the written order to destroy the liquor. The question then arises whether this is such an order as by section 4 of the Justices Protection Act ought to have been quashed before the commencement of the action. I am of opinion that it is not. I think the order which that section refers to is a proceeding *ejusdem generis* with a conviction in this respect, that it is an original adjudication by the magistrate upon some matter brought before him by charge, complaint, information or otherwise, and not an order for the purpose of carrying out or enforcing such adjudication.

It is not easy, as Paley, 5th ed., p. 159, observes, "to fix any rule for distinguishing in the abstract between what things are the subject of orders, and what of convictions." The distinction is said to be one chiefly of practice, but it will be seen that the cases which are referred to as illustrating it, are all, whether orders or convictions, adjudications.

One distinction which no longer exists shews nevertheless that the nature of both proceedings was in this respect essentially similar. "Formerly when it was necessary to allege in convictions that the defendant had been summoned, and to set forth the evidence, and to state that it had been taken in his presence and upon oath, a different rule prevailed with regard to orders. In these the evidence was not set forth, and if jurisdiction appeared the Court would intend that the justices had proceeded regularly, that the party had been summoned, and the evidence taken

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in his presence upon oath." Paley, 5th ed., 159-164, and notes; *Rex v. Justices of Cheshire*, 5 B. & Ad. 439.

Warrants of distress or of commitment are orders, yet it has never been considered necessary to quash them before action, unless, as in the case of *Haylock v. Sparke*, 1 E. & B. 471, the commitment happened to be also in the nature of a conviction. See also *Ormerod v. Chadwick*, 16 M. & W. 367 at p. 383; *Newbould v. Coltman*, 6 Exch. 189; *Kendall v. Wilkinson*, 4 E. & B. 680; *Pease v. Chaytor*, 3 B. & S. 620. What has to be got rid of is the magistrate's judgment or adjudication, which is the fundamental authority for the act complained of, and protects him so long as it remains unreversed.

That, in the present case, was the adjudication of forfeiture, which, if it existed, would be followed as a matter of course without further enquiry or examination by the written direction or order to destroy the liquors. An appeal against, or motion to quash the latter, which appears to me to be entirely of a ministerial character, would be futile. While the declaration of forfeiture stands, it is unassailable; if there was no such declaration (and none was proved), it is of no more avail to protect the magistrates than a warrant of distress not founded upon a conviction would be, and it was equally unnecessary to be set aside or quashed.

The defendants moved for a new trial, and produced a document which is said to be the written order under which the liquor was destroyed, and which may or may not also contain a sufficient declaration of forfeiture, but I entirely agree with the Court below that a new trial ought not to be granted. There was no explanation, I suppose because none could be given, why this order was not produced at the trial. It was sworn to have been returned to the defendants. We must assume that it was in their possession, and that they thought it best not to put it forward or rely on it for any purpose.

It is too late to do so at this stage, in order to set up a defence which, in the circumstances, is merely a technical

one. It is clear that the plaintiff's property has been illegally destroyed, and the defendants' conduct has been marked throughout with such reckless disregard of the law as to disentitle them to any special consideration.

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J.A.

The remaining objection relates to the notice of action. Whether the omission to give the notice should in an action against a justice of the peace be set up by way of defence or whether proof of it is by force of the 16th section of the Act made a necessary part of the plaintiff's case need not be decided. I refer to *Lawrenson v. Hill*, 13 Ir. C. L. 1, where all the authorities are cited, and in which it was held, reversing *S. C.*, 10 Ir. C. L. 498, that want of notice must be pleaded notwithstanding the section (R. S. O. (1877) ch. 73, sec. 16) which enacts that, unless the plaintiff proves among other things that the notice was given, he shall be nonsuited, &c.

It is so easy for the defendant to set it up by properly pleading the statutory defence of "not guilty," that no prudent pleader will ever allow the point to be raised; while an amendment is so much a matter of course (*a*) where the statute and sections are not set out when necessary to do so, and where, as in this case, the plaintiff is not taken by surprise, that it is very improbable that a case ever turns upon it.

I think the contents of the notice were sufficient to answer every purpose the statute required it to be given for, and I also think there was sufficient proof of service on the defendant Conmee, though it is to be regretted that for want of a little care in the preparation of the evidence there should have been any difficulty about a matter which we see from what is now brought before us by affidavit could have been made perfectly clear. Looking, however, at the evidence as it appeared at the trial, meagre as it is, I think the finding of the learned Judge that Conmee was "duly and in due time served" with the notice, cannot be interfered with. The plaintiff proved that on the 11th

(a) *Edwards v. Hodges*, 15 C. B. 477; *Vannatter v. Buffalo and Lake Huron R. W. Co.*, 27 U. C. R. 581.

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July, 1884, he left a copy of the notice for Conmee with one Rathbone at his office at Michipicoten. Rathbone was that defendant's agent or manager there. His head-quarters were there, and that may be said to have been his place of business in connection with the works he was carrying on.

It was also proved that he arrived there an hour or two after the notice was left for him. On being asked whether he had received one of the notices of action at any time he answered "Oh I seen it." Unfortunately no further question was asked, but I am not prepared to hold that the learned Judge sitting as a jury might not draw the inference that the notice had come to his hands in due time, especially as it had been asserted by the plaintiff during his examination, that Rathbone told him on the morning after the service that he had given this notice to Conmee. I cannot say that the absence of any denial from the defendant on this point when in the witness box ought not to have had some weight. But further I think the service on Rathbone at the defendant's place of business was sufficient.

The Act says it is to be served personally, or at defendant's usual place of abode. The latter term has a wider signification than that of "place of residence," and may well, as was held in *Mason v. Bibby*, 2 H. & C. 881, include a man's place of business. See also *Melbourne v. Greenfield*, 7 C. B. N. S. 1; *Attenborough v. Thompson*, 2 H. & N. 559; *Blackwell v. England*, 8 E. & B. 541.

On the whole I have no doubt that we should dismiss the appeal.

BURTON, and MACLENNAN, JJ.A., concurred.

Appeal dismissed with costs.

BETTS V. SMITH ET AL.

Contract—Tender—Incorporation of previous advertisement—Evidence.

THIS was an appeal by the plaintiff from the judgment of the Common Pleas Division, reported 15 O. R. 413, and came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A) on the 20th of May, 1889. Statement.

Lount, Q. C., and F. R. Powell, for the appellant.

Bigelow, and S. G. McGill, for the respondents.

June 29th, 1889. The Court allowed the appeal with costs, holding that the advertisement and requirements formed part of the contract, and that the plaintiff was not limited to his rights under the tender and acceptance, and a new trial was ordered. Judgment.

WEAVER V. SAWYER AND COMPANY.

Appeal—County Court—Action tried with jury—General verdict—R. S. O. ch. 47, secs. 41, 42—Practice—Depriving successful party of costs.

When a case in the County Court has been tried with a jury the only appeal given by R. S. O. ch. 47, sec. 41, direct to the Court of Appeal from the judgment at the trial is when such judgment is directed to be entered upon special findings of the jury, and it is complained of as being wrong in law upon such findings. Any other appeal raising an objection to the conduct of the proceedings at the trial on a motion for a non-suit or the reception or rejection of evidence or the charge to jury must be brought from the decision of the judge upon a subsequent motion for a new trial.

The general language of section 42 does not apply when the case is one coming within section 41.

The jury found a verdict for the plaintiff on his claim for \$200, and for the defendants on their counter-claim for \$100, and stated that they wished the plaintiff to have full costs and the defendants to have no costs, and the Judge gave effect to the expression of their wishes as to costs.

Held, that the recommendation of the jury did not constitute *good cause* for depriving the defendants of the costs of the counter-claim.

Statement. THIS was an appeal by the defendants from the County Court of Brant.

The respondent moved before OSLER, J.A., in Chambers, for an order quashing the appeal, on the ground that there was no right of appeal. This motion was referred by the learned Judge to the full Court, and came on to be heard before the Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, J.J.A.) on the 21st of May, 1889.

Aylesworth, for the appellants.

C. J. Holman, for the respondent.

June 29th, 1889. The judgment of the Court was delivered by

OSLER J.A.:—

This action was tried before the Judge of the County Court of the County of Brant, with a jury. The plaintiff sues upon an alleged warranty of a threshing machine,

and the defendants counter-claim for the balance due for the price.

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At the close of the plaintiff's case the defendants moved for a non-suit, on the ground that by the agreement sued on the property in the machine did not pass until payment of the price, and, therefore, that an action for breach of warranty would not lie. The motion was renewed at the close of the defence. There is no express ruling on the point, but it is to be inferred that the motion was not entertained, the learned Judge saying that he doubted whether it was open to the defendants, on the pleadings, to say that a sale had not taken place. Here the defendants' counsel asked to be allowed to amend by setting that up, to which the judge replied that he would allow an amendment if necessary. No amendment appears to have been made. That there was a warranty in fact was not disputed, and the learned Judge left the case to the jury generally to say whether there was a breach of the warranty in fact proved, and whether an alleged settlement of all matters in dispute, both on claim and counterclaim, was proved, and as to the damages. If the settlement was not proved, the defendants were entitled to recover \$100 on their counter-claim. The jury were not, however, required to answer questions, or to return special findings.

According to the endorsement on the record, they found a verdict for the plaintiff for \$200, and for the defendants, on the counter-claim, for \$100. They stated that they wished the plaintiff to have full costs, and the defendants to have no costs of their counter-claim, and the Judge directed judgment to be entered in accordance with the verdict on the third day of the ensuing January Sittings, "if verdict not moved against," and he gave effect to the expression of the jury's wishes as to costs. It does not appear that either party moved for judgment at or after the trial, and there was no motion against the verdict at the County Court January Sittings. The defendants now appeal to this Court direct on the ground

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J.A.

that the Judge, at the trial, should, upon the objections taken by them at the close of the case, have refused to allow the plaintiff's case to be submitted to the jury, and should have dismissed the action; or, at all events, that when all the evidence on both sides was in he should have done so, and that, notwithstanding the findings and verdict of the jury, judgment should now be entered by the Court dismissing the action. The defendants also appeal from the disposition made of the costs of the counter-claim. The question is, whether the appeal thus taken direct from the judgment at the trial, on a case tried by a jury, and where the judgment is not upon the special findings of the jury, is competent. The other branch of the appeal stands on an entirely different footing, and we do not now dispose of it.

Appeals from County Courts are given by sections 41 and 42 of the County Courts Act, R. S. O. ch. 47.

The former is taken from 48 Vic. ch. 13, sec. 23, and 50 Vic. ch. 7, sec. 30. As regards a case tried by jury, sub-section 1 provides that any party to an action in a County Court may appeal to the Court of Appeal from a judgment directed by a judge at or after the trial *upon the special findings of the jury*.

Sub-section 3. Instead of appealing to the Court of Appeal, either party may move before the County Court, within the first two days of its next quarterly sittings, for a new trial, or to set aside the judgment directed to be entered upon the special findings upon any ground, *except* that the judgment so directed to be entered is wrong in law.

Sub-section 4. Either party may appeal to the Court of Appeal from a judgment upon an application under sub-section 3.

Then sub-section 5 extends the right of moving in the County Court, by providing that where a party is entitled to move there under sub-section 3, that is, for a new trial, or to set aside the judgment on the special findings, he may move upon *all* grounds which would be open to him if he were appealing to the Court of Appeal; and, therefore,

it would seem, even upon the ground that the judgment upon this finding is wrong in law.

I do not notice those parts of section 41, which deal with appeals from the judge's judgment in a case tried by him without a jury.

The section on which the right of appeal formerly depended was section 35, R. S. O. 1877, ch. 43, which provided that any party dissatisfied with the decision of the judge (*a*) upon points reserved, (*b*) or upon any points of law arising upon the pleadings, (*c*) or respecting the reception or rejection of evidence, (*d*) or with the judge's charge to the jury, (*e*) or with the decision upon any motion for non-suit, or for a new trial, (*f*) or in arrest of judgment, or for judgment *non obstante*, might appeal to the Court of Appeal.

Appeals under this section were, of course, always brought from the decision of the judge upon the motion in Term.

In appendix A to the Revised Statutes, 1887, p. 2689, it is noted that this section was superseded by 48 Vict. ch. 13, sec. 23, now, in effect, section 41 of the present County Courts Act.

Section 41 is not happily expressed in some respects. A strict reading of its third sub-section might admit of the conclusion that the right to move for a new trial is given merely as the alternative of an appeal in a case where there have been special findings, and, therefore, limiting it to a case of that kind; but having regard to the fact that section 35 has been deemed to be superseded, I think we must treat sub-section 3 as conferring the right to move for a new trial generally in any case, on any proper grounds, in the County Court sittings held under section 12 of the County Courts Act, or Rule 488, (Consol. Rule 1255), as well as the right to move there against the judgment on the findings where there are special findings on any ground except that such judgment is wrong in law. Then, in order that the whole case may come, once for all, before the Court of Appeal, when other questions are in-

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volved beyond the mere propriety in law of the judgment on the findings, the fifth sub-section enables a party who is entitled to move for a new trial, to move also against that judgment at the quarterly County Court sittings, even on the ground that it is wrong in law.

Section 29 of the County Courts Act also enacts that the several County Courts may set aside verdicts or non-suits, and grant new trials. These sections were considered by us in *Norton v. McCabe*, 12 P. R. 506, where it was held that although a motion could not be made for a new trial etc., later than the first two days of the usual quarterly sittings, it might be made at any earlier time the Judge chose to entertain it: Rule 488, (Con. Rule 1255). Rule 307, (Con. Rule 789) provides that where there has been a trial by a jury, any application for a new trial shall be to a Divisional Court. In *Ferguson v. McMartin*, 11 A. R. 731, it was said, pp. 734-735, that a County Court, sitting at the times which represent the abolished terms, is intended to exercise the same functions which, by this and other rules, are given to Divisional Courts in hearing motions for new trials in jury cases. That is the effect of Rule 490 of the Judicature Act. See, now, sections 12 and 28 of the present County Courts Act, and Consol. Rule 1257. See, also, *Williams v. Crow*, 10 A. R. 301, 313.

I think it is clear that when a case has been tried by a jury, the only appeal given by section 41 immediately to the Court of Appeal from the judgment at the trial is when such judgment is directed to be entered upon special findings of the jury, and it is complained of as being wrong in law upon such findings. Any other appeal raising an objection to the conduct of the proceedings at the trial on a motion for a nonsuit, or the reception or rejection of evidence, or the charge to the jury, must be brought from the decision of the judge upon a subsequent motion for a new trial, etc., at the sittings held under section 12, or Rule 488, (Consol. Rule 1255.) The intention of the legislature evidently was that all questions of this kind arising

in a jury case should be disposed of by the Judge upon an independent application at the County Court sittings after the trial, from his judgment upon which, as the final judgment in the cause, an appeal is given by sub-section 4 of section 41. This is to be inferred from the sections I have quoted, and also from Consol. Rules 1257 and 1258, the former of which provides that the pleadings, practice, and procedure in actions in the High Court shall apply and extend to actions in the County Courts; and the latter, that in actions in the County Courts motions against judgments and for new trials shall be disposed of upon the like grounds and principles as in the High Court. Nothing, it is true, is expressly said as to moving in the County Court to enter a nonsuit, or against the Judge's refusal to do so at the trial. That was unnecessary, for the power clearly exists, and may be exercised by the Judge upon the motion for a new trial under Consol. Rule 755, formerly Rule 321: *Stewart v. Rounds*, 7 A. R. 515; *McConnell v. Wilkins*, 13 A. R. 438.

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J.A.

It is hardly necessary to say that the judgment at the trial in this case is not a judgment upon special findings of the jury, which are those returned in answer to questions submitted to them or entered by the clerk by the proper directions under Consol. Rule 687. It is a judgment entered upon a general verdict for each party upon the claim and counter-claim.

Against such a judgment I am clearly of opinion that the party complaining of it was bound, by sections 29 and 41, to move in the County Court in the first instance, and that no appeal lies direct therefrom to this Court.

Section 42 is the only other section which gives an appeal from the Judge's decision, but, though, no doubt, couched in very wide terms, I think it is not applicable, because the case before us is one for which special provision has been made by section 41, and the right of appeal being, as I have said, given by that section, is, therefore, necessarily to be pursued and reached under it.

It has been pointed out, that about a year ago we heard appeals similar to the one before us in *Connell v. Hickson*,

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and *Cartwright v. Cartwright*. The objection now taken was, however, not raised by the parties or noticed by the Court. If it had been we must have quashed the appeals in those cases, as we are obliged to do in this. We think that, under the circumstances, it should be quashed without costs.

The appeal from the judgment on the counter-claim stands in a different position. It is confined to the order made by the Judge, depriving the defendants of their costs, and is maintainable under section 42 as an appeal from an order, in its nature final, made by the Judge under a power conferred upon him by Rules of Court; and the question is whether there was good cause for making the order. The defendants have recovered their debt, and nothing appears in the case to shew that they should not have sued for it, or that there was, on any ground, good cause to deprive them of costs. The learned Judge seems to have acted upon the recommendation of the jury, which I cannot for a moment recognize as constituting good cause. In actions which sound in damages, such as libel, slander, etc., it may well be that a Judge may take into account in considering whether there is cause, the fact that the jury have expressed an opinion of the plaintiff's merits by a contemptuous verdict. But this is not a case of that kind, and the Judge, so far as we can see, has simply acted upon the discretion of the jury, not upon his own.

This appeal, I think, should be allowed, and the judgment below varied, so that the defendants shall receive the ordinary costs of the counter-claim. We follow the course we took last term in the case of *Foster v. Veigel*, 13 P. R. 133, a jury case, in which the defendant appealed from the judgment on the claim, and also from the judgment as to costs on his counter-claim, which limited him to Division Court costs. We dismissed the principal appeal, and allowed that as to the costs, holding that there was no good cause shewn for not leaving the costs of the counter-claim to follow the event on the County Court scale.

Appeal quashed in part and allowed in part.

HUTCHINSON V. CANADIAN PACIFIC R. W. CO.

Railways—Negligence—Contributory negligence—Travelling by freight train—Injury caused by shock of connecting cars—Getting into train before it is made up.

THIS was an appeal by the plaintiff from the judgment of the Chancery Division, reported 17 O. R. 347, and came on to be heard before this Court, (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 22nd and 23rd of May, 1889. Statement.

Osler, Q.C., M. Walsh, and A. W. Aytoun-Finlay, for the appellant.

Aylesworth, and A. MacMurchy, for the respondents.

June 29th, 1889. The Court dismissed the appeal with costs, holding that no specific neglect of duty by the defendants had been proved, and that the plaintiff could not recover. Judgment.

MCDONALD v. JOHNSTON.

New trial—Trial without a jury—Rejection of evidence.

Statement. THIS was an appeal by the plaintiff from the judgment of STREET, J.

The action was brought to set aside a conveyance made by the plaintiff in favour of the defendant, and in the statement of claim it was charged that the conveyance in question was never executed or delivered by the plaintiff, but that the alleged execution thereof was obtained by the defendant's fraud, and that the plaintiff signed the conveyance thinking that he was signing another instrument relating to the estate of his deceased wife. There was also a general charge that the execution of the conveyance had been obtained by the fraud and undue influence of the defendant, but there were no specific allegations as to the nature of the fraud or undue influence. The statement of defence was a mere general denial of the allegations set out in the statement of claim. At the trial the plaintiff tendered evidence as to the defendant having induced him to drink to excess about the time of the transaction in question; as to the plaintiff's want of education or business capacity and other evidence of that nature, and also evidence as to the position of the wife's estate and as to transactions between the parties in connection with it, but the learned Judge ruled that this evidence could not be introduced under the general allegations contained in the statement of claim, and at the end of the case gave judgment in favour of the defendant.

The plaintiff appealed, and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 23rd and 27th of May, 1889.

Moss, Q. C., and Code, for the appellant.

J. H. Macdonald, Q. C., for the respondent.

June 29th, 1889. The Court were of opinion that the exclusion of evidence had been pushed too far, and that for a proper determination of the real merits of the case it would be advisable to admit evidence of every circumstance, declaration, or negotiation between the parties, which could throw any light on conduct or motive, and they ordered a new trial, costs to abide the final result, each party having leave to amend. Judgment.

MOORE V. JACKSON.

Husband and wife—Contract—Married woman—R. S. O. ch. 132.

To entitle a plaintiff to recover judgment on a contract entered into by a married woman it is necessary for him to show that at the time the contract was entered into by her she owned separate estate in respect of which she is entitled by statute to contract.

The defendant, a married woman, endorsed certain notes held by the plaintiff and wrote him the following letter :

“ I hold 400 acres of land near W. which is worth \$33,000 and is all in my own name and right. By your renewing the note for \$1,500 and the other for \$600 I pledge myself solemnly to do nothing to affect my interest in the said lands either by deed or mortgage unless said notes are paid to you in full.”

The notes and the letter were proved at the trial and the examination of the defendant before the trial in which she stated that at the time she signed the notes she owned property on her own account was also put in. There was no evidence as to the date of the marriage of the defendant or as to the mode in which the property was held by her.

Held, reversing the decision of BOYD, C., that there was not sufficient evidence to entitle the plaintiff to recover.

THIS was an appeal from the judgment of BOYD, C.

Stonehouse and Essery, the owners of certain property in Toronto, applied to the plaintiff for a loan on the security thereof for the purpose of erecting buildings thereon and the plaintiff agreed to lend them the sum of \$12,000 to be advanced from time to time as the buildings were erected. A mortgage was given by Stonehouse and Essery to the plaintiff to secure the sum of \$12,000 and large advances were made by the plaintiff from time to time. It was agreed that the defendant Jane Jackson should give to the plaintiff notes as collateral security for

Statement. the amount of the advances and after giving to the plaintiff notes for \$1,500 and \$600 respectively she signed the following letter:

TORONTO, 23rd July, 1886.

EDWARD MOORE, TORONTO,

DEAR SIR,—I hold four hundred acres of land near Weston and Lambton, which is worth thirty-three thousand dollars, and is all in my own name and right.

By your renewing the note for \$1,500 and the other for \$600, I pledge myself solemnly to do nothing to affect my interest in said lands, either by deed or mortgage, until said notes are paid to you in full. Interest on renewal notes to be paid at the rate of one and half per cent. per month.

Yours truly,

(Signed) JANE JACKSON.

Witness (Signed) GEO. W. STONEHOUSE.

There was due in respect of these two notes at the time the action was brought the sum of \$2,467.84. Jane Jackson afterwards gave further promissory notes to the plaintiff, as he made advances to Stonehouse and Essery, until she had signed notes amounting in all to about \$11,000. The plaintiff subsequently advanced about \$1,000, but the defendant gave no note to secure this.

Stonehouse and Essery were unable to carry out the terms of their agreement with the plaintiff and under the power of sale contained in the mortgage the property was sold for about \$8,170, the purchase money being applied by the plaintiff generally in reduction of the whole amount due to him on the notes and on the advance for which no notes were held. He then brought this action against the defendant to recover the balance, amounting, with interest, to about \$4,262.

The defendant Jane Jackson was at the time the notes were made and the letter signed and at the time the action was brought a married woman, and set this up as a defence, and the plaintiff joined issue. After the making of the last note, the defendant Jackson and her husband conveyed to the defendant Mary Jane Graydon, her daughter, certain lands in the Township of Etobicoke, and in this action the plaintiff charged that this conveyance was entered

into for the purpose of defeating, delaying and hindering the plaintiff in the recovery of his claim against the defendant Jane Jackson, and he asked that the conveyance should be declared fraudulent and void as against him. The defendant Graydon did not appear in the action, and it was admitted that she took the property only as a volunteer. Statement.

The action was tried before BOYD, C., at Toronto, on the 20th of November, 1888. The notes in question and the letter above referred to were proved, and the examination of the defendant Jane Jackson was put in, in which she stated that at the time of the making of the promissory notes she was a married woman, and that at that time she "owned property on her own account." There was no evidence as to the time of the marriage or as to the mode in which the property was held by her.

At the conclusion of the trial the following judgment was delivered by the learned Chancellor.

"I think as to the form of this judgment it will be sufficient to say that as to the \$2,467.84, it should be declared that they are properly charged on this property. It seems to me that this writing is sufficient to indicate all that the statute requires. The parties were dealing on the faith of this being such estate as could be laid hold of by the creditor; and it is doing no injustice to give it this fair and reasonable meaning, and not to import something that it does not say. I don't think the argument can be advanced that these notes are paid even as to the form of the account. If that be looked at, the plaintiff has drawn up an account of the various payments; and according as he has brought in the account the application of the payment would be to the first item; but I think it is probably correct that there has been no application on either side. That being the case, I don't understand the law to impute the payment to the earliest items; but the law, when the accounts are being taken, will impute the payments so as not to work injustice. That would be the case if it were an application made by the Master, so as not to work injustice

Statement. to anybody, *ex æquo et bono*. The other defendant, Mary Jane Graydon, is a volunteer; she can only take what Jane Jackson takes; and she admits that this property is held by her in trust; so that I am doing no injustice to her to charge the claim upon the property. Judgment will be in that form, costs to be added to the claim.

Mr. Armour--Your Lordship dismisses the action as to the other notes.

BOYD, C.—No; I just add the costs to the claim, and let it stand in that way. There will be no dismissal."

The judgment was drawn up for the whole amount of the plaintiff's claim, and a motion was made before the learned Chancellor to vary the minutes, and reduce the sum to \$2,467.84, but this motion was dismissed with costs.

The defendant, Jane Jackson, appealed; and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.) on the 28th of May, 1889.

E. D. Armour, for the appellant. It was necessary for the plaintiff to prove that the defendant had separate estate at the time the notes were given, but there is no evidence to show this, or to show the nature of the property, which is all important. Before the Act of 1884 only the separate estate, owned by the married woman at the time of entering into the contract, was rendered liable, and since that Act future acquired separate estate is rendered liable, but still it must be shown that the married woman owned some separate estate at the time the contract was entered into before any liability whatever accrues. Mere proof that the married woman had property is not sufficient, because certain kinds of property may be held by her without bringing her within the provisions of the Act: *Re Shakespear*, 30 Ch. D. 169; *Palliser v. Gurney*, 19 Q. B. D. 519. The only change effected by the Act of 1884 is that it is no longer necessary to show the intention of the married woman to bind her separate estate. If the contract is made out and it is proved

that separate estate was owned at the time the contract was entered into, then the statute says that the separate estate is deemed to be bound. The letter is no evidence against the defendant: *Bell v. Riddell*, 2 O. R. 25, and at any rate it does not bring the case within the statute. At best the effect of that letter is to charge the first two notes only on the separate estate and to exclude all others, because if the defendant is liable at all she is liable not by virtue of the letter but by virtue of her ownership of separate estate, and the express charging of the two notes on the separate estate shows that the other notes were not intended so to be charged. Then the defendant Jackson is admittedly a surety only and the proceeds of the sale of the property should be applied either first in payment of the notes or at all events proportionately on the whole debt: *Pearl v. Deacon*, 24 Beav. 186; *Kinnaird v. Webster*, 10 Ch. D. 139; *Ellis v. Emmanuel*, 1 Ex. D. 157; *Hobson v. Bass*, L. R. 6 Ch. 792; *Gray v. Seckham*, L. R. 7 Ch. 680.

Moss, Q. C., and *J. R. Roaf*, for the respondent. The letter contains sufficient proof of separate estate and the defendant admits that she, at the time the notes were given, owned property on her own account. The onus was on the defendant to show that the property referred to was not separate estate. The plaintiff had the right to repay himself out of the proceeds of the sale the amount advanced by him for which he held no notes, that being the portion least secured: *DeColyar*, 2nd ed., pp. 397, 398.

Armour, in reply.

June 29th, 1889. BURTON J. A.:—

The plaintiff's claim is apparently based upon the idea that the Act of 1884 has removed all the disabilities of a married woman to contract. The plea of the defendant that at the time she entered into the contract she was a married woman was a complete bar to the plaintiff's

Judgment.

BURTON
J.A.

recovery, in the absence of a reply that she was at that time possessed of separate estate or an amendment to the statement of claim to that effect—for it is clear that she has not an unlimited capacity to enter into any contract.

If she has no separate property she is still incapable of contracting.

The judgment given at the hearing seems also to have been based on this understanding of the Act of 1884, although when the decree came to be formally drawn up it included all the notes mentioned in the statement of claim, and was in that form approved of by the learned Chancellor, which would seem to point to the view that he looked upon the letter as an admission by the married woman of her having separate estate, and that that separate property therefore was liable not by virtue of the special contract, but for her general engagements.

The letter cannot be regarded as such an admission, even if an admission by a married woman incapable of contracting could be relied upon as evidence of the facts purporting to be admitted.

To enable the plaintiff therefore to recover he was bound to allege and prove the existence of some separate property at the time of entering into the alleged contract, and having failed to do so has not made out a case for recovery.

The judgment appealed from must therefore be reversed and the appeal allowed.

MACLENNAN J. A. :—

The reasons of the learned Chancellor printed in the appeal book are very short, scarcely more than a brief note of the conclusion to which he had come, and he seems to have been of the opinion that the instrument of the 23rd of July, 1886, was sufficient to charge the married woman's lands, and that the parties were dealing on the faith of the lands in question being such estate as could be laid hold of by the creditor, and that such was its fair and reasonable meaning.

After hearing a very full argument by Mr. Moss, Q. C., and Mr. Roaf, in support of the judgment, I am with great respect unable to agree in the conclusion arrived at by the learned Chancellor, and I think the judgment cannot be maintained.

Judgment.

MACLENNAN

J.A.

If Mrs. Jackson had not been a married woman, I am not satisfied that the letter of the 23rd of July would be sufficient to charge her lands with the payment of the notes therein mentioned. It would be a contract for valuable consideration on which an action would lie for the breach of it, and from the breach of which the debtor would probably be restrained until the creditor could recover judgment and execution for his debt, but I think the creditor could acquire no lien or charge on the land for his debt otherwise than by judgment and execution in the ordinary way. No authority was cited to us in support of this proposition, nor have I been able to find any going so far. I think the letter does not give or contract to give the creditor an interest in the land, and that it cannot either at law or in equity be carried farther than the simple and ordinary meaning of the language employed, which is plain enough.

The notes mentioned in this letter amounted with interest to \$2,467.84 only, and if it were a good equitable charge it would still not be available to the plaintiff for more than those two particular notes. The learned Chancellor's judgment in the first place confined the relief to this sum, but it was afterwards extended to the whole balance due to the plaintiff, but on what grounds we have not been informed.

The judgment would also seem to be wrong in allowing the plaintiff to charge against the defendant, in his account of the application of the purchase money of the mortgage property, the sum of \$1,022 advanced by him to the mortgagors or paid on their behalf after the defendant became surety: *Forbes v. Jackson*, 19 Ch. D. 615.

But the ground on which the judgment was mainly supported was that the defendant's Etobicoke property must

Judgment. be taken to be separate estate of the defendant, the
MACLENNAN married woman, and that for that reason the plaintiff was
J.A. entitled to succeed, and that is the question we have to consider, and on which, in my judgment, this appeal really depends.

The Act which governs this case is "The Married Women's Property Act, 1884," now R. S. O. ch. 132, and by section 3, sub-section 2, of that Act a married woman is entitled to enter into and to render herself liable in respect of and to the extent of her separate property on any contract and to sue and be sued in all respects as if she were a *feme sole*, and any damages or costs recovered against her in any such action shall be payable out of her separate property and not otherwise. By sub-section 3 every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property unless the contrary is shown, and by sub-section 4 such contract shall bind not only her property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.

The Act then goes on to say what the law shall be with regard to different classes of married women; first as to women married on or before the 4th of May, 1859, without any marriage settlement, next as to women married between the 4th of May, 1859, and the 2nd of March, 1872, without any marriage settlement, and then as to those married after 1872. As to some married women also a difference is made, depending on the time when the title accrued.

It is therefore not the fact that the property of a married woman is necessarily her separate property. Whether it is or not depends on a variety of circumstances, which must be made to appear before the fact can be determined.

Nor is there any presumption that property such as that in question in this case is the separate property of the married woman. The 9th and 10th sections of the Act do create such a presumption with regard to certain kinds of property, standing in the name of a married

woman on or after certain dates, but this does not extend to real estate. Judgment.

MACLENNAN
J. A.

Now a married woman by reason of her coverture was always incapable of contracting except to the extent which the doctrines of equity enabled her to do, with reference to her separate estate, and she is still incapable, except to the extent she is enabled to do so under "The Married Women's Property Act."

It is decided under the corresponding English Act, that unless she has separate estate at the time of the alleged contract, it is wholly nugatory and void. This was first decided in *Re Shakespear*, 30 Ch. D. 169, and afterwards approved of by the Judges of Appeal sitting as a Divisional Court in *Palliser v. Gurney*, 19 Q. B. D. 519.

In my judgment it was a necessary part of the plaintiff's case, to enable him to recover, to allege and prove not only the making of the notes by the married woman, but also that she then had property which was her separate estate, in respect of which she was enabled by the Act to contract and to render herself liable. He has neither alleged nor proved this essential fact, and I am therefore of opinion that the appeal must be allowed, and that the action should be dismissed with costs.

HAGARTY, C. J. O., and OSLER, J. A., concurred.

Appeal allowed with costs.

CRAWFORD V. UPPER.

Negligence—Injury caused by runaway horse—Liability of owner—Onus of proof.

The plaintiff while walking on the sidewalk, was knocked down and injured by the runaway horse of the defendant. At the time of the accident the horse was harnessed to a sleigh, but no person or driver was in the sleigh, and all that was proved was that the horse was seen running away; that the sleigh upset, the occupants being thrown out, and that the horse ran on the sidewalk and the accident occurred.

Held, that this was sufficient to make out a *prima facie* case of negligence, and that the onus of disproving that case and explaining the cause of the runaway lay upon the defendant.

Manzoni v. Douglas, 6 Q. B. D. 145, discussed.

Judgment of the Queen's Bench Division affirmed.

Statement.

THIS was an appeal from the judgment of the Queen's Bench Division setting aside the judgment of non-suit entered at the trial of the action and directing a new trial.

The action was brought to recover damages for injuries sustained by the plaintiff by being knocked down by a horse owned by the defendant Joseph Upper, and driven by his son the defendant Francis Upper.

The plaintiff, a young lady residing in the village of Portsmouth, was on the 9th of January walking on the sidewalk on College street in the city of Kingston, when she was run over by the horse and seriously injured. The evidence shewed that the horse in question was being driven by the defendant Francis Upper, a boy of about thirteen years of age, in a northerly direction along Princess street in the city of Kingston, and on the left side of the street, which runs at right angles to College street, and when nearing the corner of College street was being driven at a very quick rate, or else was even then running away, and turned very suddenly to the left along College street. At the corner the road sloped a little to the left, and was on that day very slippery, and the sleigh in turning upset, the driver being thrown out, and the horse running on knocked down the plaintiff.

The action was tried before ROSE, J., at Kingston on the 8th and 9th of October, 1888, and at the conclusion of the

plaintiff's case judgment of nonsuit was entered, the learned Judge holding that the onus was upon the plaintiff to give *prima facie* evidence of negligence, and that the mere proof that the horse had run away and had thrown out the occupant of the vehicle, and had run over the plaintiff was not sufficient evidence upon which the jury could find negligence. Statement.

This judgment was reversed upon motion to the Queen's Bench Division, and the appeal of the defendants therefrom came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.,) on the 28th of May, 1889.

Whiting, for the appellants. The mere happening of the accident is no evidence of negligence causing it. There must be direct evidence of negligence, and there is none here, and the nonsuit was right. If an injury is caused by an inanimate object, then there is a presumption of negligence, because there is no volition in an inanimate object; but in a case like this, where an injury is caused by an animal, the person complaining must shew something more than the mere happening of the accident itself. No evidence whatever was given here, that the running away of the horse was caused by the driver's negligence or want of care, and no case was made out that the defendants should be required to answer: *Manzoni v. Douglas*, 6 Q. B. D. 145; *Hammack v. White*, 11 C. B. N. S. 588; *Tillett v. Ward*, 10 Q. B. D. 17; Pollock on Torts, p. 360.

Aylesworth. for the respondent. There was ample evidence of negligence. The driver was a very young lad, and the father should not have entrusted him with the driving of a horse in a crowded street. Then he was driving on the wrong side of the street, and the upset was caused by his driving at an immoderate rate of speed and making too short a turn. At any rate it is sufficient for the plaintiff to shew that while lawfully walking along the street she was injured by a runaway horse, the onus then being thrown upon the defendant to shew that the run-

Argument. away was not caused by any negligence on his part: *Watson v. Weekes*, W. N., 1887, p. 77, 4 Law Quarterly Review, 489; *Tolhausen v. Davies*, 57 L. J. Q. B. 392, 59 L. T. N. S. 436. In *Manzoni v. Douglas*, an experienced coachman was driving quietly and the horse suddenly bolted without any assignable reason, and there was clearly no negligence. If the accident in that case had been unexplained, there would not have been any nonsuit. In *Hammack v. White*, the rider was carried away by a sudden freak of the animal. In *Tillett v. Ward*, the decision would have been different if the door in question had been shut. The door being open, there was no trespass. See also Whittaker's Smith on Negligence, p. 231.

Whiting, in reply. *Watson v. Weekes*, does not apply, because the plaintiff has not been content to rely merely on proof of the accident, but has gone further, and has tried to explain the occurrence, and has herself brought the case within *Manzoni v. Douglas*.

June 29th, 1889. The judgment of the Court was delivered by

HAGARTY C.J.O.:—

All that appeared in evidence was that the plaintiff while walking on the sidewalk was knocked down and injured by the horse and sleigh of the defendant, no person or driver then being in it. The horse and cutter were first seen on a street at right angles to College street, on which the accident happened. The horse was then apparently running away at a very fast pace. On turning into College street at this rapid rate, the cutter was upset, the boy defendant and his companion were thrown out, and the horse ran on to the sidewalk, and the plaintiff was struck.

Nothing was proved as to the origin or cause of the running away.

The learned Judge directed a nonsuit, considering there was no affirmative proof of negligence to go to the jury.

The Court of Queen's Bench set this nonsuit aside. We are not furnished with any statement of the reasons, or of the views, of the learned Judges.

Judgment.

HAGARTY
C.J.O.

It is urged with much force for the plaintiff that a sufficient *prima facie* case was made out to go to the jury, and for recovery unless answered.

The defendants insist that there is no negligence shewn, or that at best it presents a case equally consistent with the absence or presence of negligence.

The case of *Manzoni v. Douglas*, 6 Q. B. D. 145, is in point. The plaintiff was knocked down on the sidewalk in Charing Cross by the defendant's horse and brougham. The horse was galloping, the coachman doing his best to stop him. One of the plaintiff's witnesses proved that he saw the brougham coming up from Whitehall towards Charing Cross at a very quiet pace. All at once opposite Scotland Yard the horse bolted and galloped on, the coachman doing all he could to stop him; he had no control over the horse. The Judge nonsuited on the authority of *Hammack v. White*. The case was very fully argued in the Divisional Court.

I think the true point is well put by Lindley, J.: (p. 152) "The plaintiff was lawfully walking on the foot pavement of a public thoroughfare, and was knocked down by a horse drawing the plaintiff's (*sic*) brougham. If the case had been left there, it might be that the defendant was liable for the negligent driving of her servant. But the explanation was given by the plaintiff's witnesses, viz., that the horse had bolted, and the defendant's coachman had lost all control over it. We do not know what it was that caused the horse to bolt; and therefore we have no evidence that it was caused by the driver's negligence or want of care. * * To hold that the mere fact of a horse bolting is *per se* evidence of negligence would be mere reckless guesswork."

If in the case before us it had been shewn either by the plaintiff's or the defendants' evidence that this horse or pony had bolted or started to run away, and thus became un-

Judgment.

HAGARTY
C.J.O.

manageable without the driver's default, the cases would be undistinguishable, and the nonsuit right.

We have to say here whether the fact of a horse in the street of a city being seen running away upsetting the cutter and throwing out the driver and then running into the sidewalk and injuring a passenger thereon, does not shew a *prima facie* case. I am inclined to think that it does.

It would be hardly fair on persons injured in this way if the additional burden of proof of the cause or reason of the runaway should be cast upon them. It might in many cases be next to impossible to prove what took place in some other street, &c.

I think the reasonable view of the law, and of the ordinary transactions of human life is, that if a man's horses galloping through a street run on and injure a passenger on the sidewalk, a case of *prima facie* wrong is shewn. It may be fully explicable, but I think it calls for explanation.

In a case within the last year, *Tolhausen v. Davies*, 59 L. T. N. S. 436, Mr. Justice Smith mentions a case of *Watson v. Weekes*, affirmed by the Court of Appeal, in which he held that upon proof given that the defendant's horse, harnessed to a cart, was running away unattended along a highway, whereby plaintiff was injured, a Judge could not rightly nonsuit, for that the facts were more consistent with the absence of ordinary care in the superintending the horse than with such care having been used.

In that case there was the fact of there being no driver to the runaway horse.

The proposition often cited from Erle, C.J., in *Hammack v. White*, 11 C. B. N. S. 588, as to the necessity of giving affirmative evidence of negligence is qualified by remarks made in such cases as *Byrne v. Boadle*, 2 H. & C. 722. There are some accidents from which by their mere occurrence negligence may be inferred, *res ipsa loquitur*.

Bramwell, B., says, p. 727 : "Looking at the matter in a reasonable way it comes to this—an injury is done to the plaintiff, who has no means of knowing whether it was

the result of negligence ; the defendant, who knows how it was caused, does not think fit to tell the jury." (p. 726.) " No doubt the presumption of negligence is not raised in every case of injury from accident, but in some it is. We must judge of the facts in a reasonable way ; and regarding them in that light we know that these accidents do not take place without a cause, and in general that cause is negligence."

Judgment.

HAGARTY
C.J.O.

I also refer to *Simson v. London General Omnibus Co.*, L. R. 8 C. P. 390, where an omnibus horse suddenly kicked and injured the plaintiff, then a passenger. It was held that this was *prima facie* evidence of negligence.

On the whole I come to the conclusion that we must dismiss this appeal ; that in the absence of any proof as to the cause of the horse originally running away or bolting, or as to how it got beyond the control of the driver, the case should have gone to the jury.

I think it most in accordance with authority and good sense to hold that the fact of a defendant's horse rushing at speed apparently beyond control along a street and injuring a passenger on the sidewalk in itself calls for explanation on the part of the defendant who may or may not be able to prove that the cause of his so running was not from any fault or neglect of himself or his driver. As Lord Bramwell remarked, the plaintiff may be wholly unable to shew how this really was, the defendant generally is able to explain it.

Appeal dismissed with costs.

CARROLL V. PENBERTHY INJECTOR COMPANY.

Company—Libel—Publication—Admission of manager—Liability of corporation for libel published by manager.

The plaintiff was the patentee and manufacturer of an automatic steam injector and the defendants were a company manufacturing automatic steam injectors, one J. being their manager. A printed circular signed "Penberthy Injector Company," contained certain statements as to the mode in which the plaintiff had obtained his patent, and this action was brought by him on the ground that these statements were libellous. At the trial it was proved that the circular had been found in various places, but the only proof of publication was an admission by J., made in conversation with the plaintiff, that the circular had been issued by the Penberthy Injector Company in reference to a circular issued by the plaintiff.

Held, that no authority can be inferred in a general manager or other officer of a bank or trading corporation of any kind to subject the corporation to actions for libel by his admissions to any person that he had published a libel on another person by their authority, and that there was therefore no proof of publication.

If J. had been called as a witness and had proved that he had been so authorized, and that it formed part of his duty to do the act complained of, then the libel would be the act of the corporation.

Tench v. Great Western R. W. Co., 33 U. C. R. 8, distinguished.

Decision of the Queen's Bench Division reversed.

Statement.

THIS was an appeal by the defendants from the order of the Queen's Bench Division, dismissing with costs a motion to set aside the verdict and judgment entered at the trial in favour of the plaintiff in an action of libel.

The plaintiff was the patentee of a certain improvement in steam injectors known as "The T. J. C. Improved Automatic Injector," and was the superintendent of the Hamilton Brass Company, who manufactured them. The defendants were an incorporated company carrying on business at the city of Detroit, and also at the town of Windsor, and were engaged in the manufacture and sale of an article known as "The Penberthy Improved Automatic Injector." The plaintiff alleged that the defendants falsely and maliciously wrote, printed, and published, of and concerning the plaintiff, the following circular:

"IMPORTANT.

Statement.

DETROIT, January 11th, 1888.

"To our Customers and the Trade,—

"We refer you to the letter below from the well-known barristers, McQuesten & Chisholm, of Hamilton, Can., which explains, in a measure, the circular lately issued by the Hamilton Brass Company, warning our company against using the Penberthy Injector. We can safely assure you that the methods employed to obtain the patent were of such a nature that the patent may be set aside.

"Pay no attention to their circular, and rely on us to protect you to the fullest extent. We would add that, as our cuts, sectional diagrams and circulars (even to colour) have been copied in the imitation, we would warn you against the deception, and also against having anything to do with the Injector.

"Yours, respectfully,

"PENBERTHY INJECTOR COMPANY."

"HAMILTON, CANADA, December 29th, A.D., 1887.

"THE PENBERTHY INJECTOR COMPANY,

"Corner 7th and Abbott Streets, Detroit.

"Dear Sirs,—

"We have before us diagrams and circulars of the T. J. C. Improved Automatic Injector. That the declarations of the patentee, in order to obtain a patent, were grossly untrue; that the patent (*sic*) can successfully impeach the same, we have no doubt whatever, from the evidence supplied by yourselves, and the Patent Department at Ottawa.

"It would be well to warn parties using the same, of the grave risk they are incurring by so doing, not only in purchasing something they are likely to be deprived of, but in being mulcted in damages for using it from day to day.

"Yours, truly,

"MCQUESTEN & CHISHOLM."

Statement.

The defendants denied that they wrote and published the circular referred to, and contended that, if they were held responsible for the circular, it must be taken to have been written and published in good faith, and for the protection of the interests of the defendants, and that publication of it was privileged.

The action was tried before FALCONBRIDGE, J., and a jury, at the Hamilton Winter Assizes of 1889. It was proved that copies of the circular had been received by several persons with whom the plaintiff was accustomed to deal, but the only proof of publication by the defendants was the statement of the plaintiff that one Johnston, who was, the plaintiff alleged, manager of the defendants' business at Windsor, had told him that the circular had been issued by the Penberthy people in reply to a circular issued by the plaintiff.

The case was submitted to the jury, and a verdict for \$300 in favour of the plaintiff was returned by them, and upon appeal to the Divisional Court this verdict was upheld.

The defendants appealed, and the appeal came on to be heard before this Court (HAGARTY, C.J.O, BURTON, OSLER, and MACLENNAN, JJ.A.) on the 29th of May, 1889.

George Lynch-Staunton, and *James Chisholm*, for the appellants. There was no proof of publication. A certain circular is produced, but the defendants are in no way connected with it, the only proof being that a person who is said to be an agent of the defendants admitted that he issued it. Evidence of publication by the agent is not, however, enough, for an agent, as such, would have no authority to issue such a circular. Such an act would be outside the ordinary purposes of an agent's employment, and would not be incidental to his proper duty: *Myles v. Thompson*, 23 U. C. R. 553; *Kirkstall Brewery Co. v. Furness Railway Co.*, L. R. 9 Q. B. 468; *Tench v. Great Western R. W. Co.*, 33 U. C. R. 8. Even if the agency were sufficiently

proved, still the admissions of the agent not having been made at the actual time of publication, but at a subsequent date, are not admissible in evidence against the defendants: *Packet Company v. Clough*, 20 Wall. 528; *Insurance Company v. Mahone*, 21 Wall. 152; *Vicksburg R. W. Co. v. O'Brien*, 24 Cent. L. J. 13; *Great Western R. W. Co. v. Willis*, 18 C. B. N. S. 748.

Moss, Q. C., and *Carscallen*, for the respondent. This circular relates solely to steam injectors, and to manufacture these is the business of the defendants. The manager of that business clearly acted in connection with that business in publishing the circular, and within the scope of his authority, and did not commit a collateral or unauthorized act. If the manager had authority to take reasonable steps for the protection of the business of his employers, and clearly he has that authority, then the employers must be held liable if he goes further than is reasonable and proper, and so they are liable for the libelous circular issued by him.

George Lynch-Staunton, in reply. The question here is not that of the right of an agent to publish the libel, but is whether the agent had any right to admit the fact of publication. The making of the admission was not an incident of his employment, and cannot bind the appellants: *Re Cunningham & Co.*, 36 Ch. D. 532.

June 29th, 1889. The judgment of the Court was delivered by

HAGARTY C.J.O.:—

It is only necessary to notice the defence of "not guilty." The action was brought on the statement in the circular. Proof was given that they had been circulated or found in different places in Ontario. It was sworn by the plaintiff that one Johnston was financier and manager of the defendant company.

Judgment.

HAGARTY
C.J.O.

Question.—“ I suppose you view him a good deal like a bank manager in that sense.” A. “ He runs the whole institution. He has full control of everything.”

The chief place of business was in Detroit, and they do a large business in Canada. He is spoken of by the witnesses as the manager of the company. The defendants are spoken of in the case and in the charge as a corporation.

The only evidence of publication was an admission made in conversation, by Johnston, the alleged manager of defendants' company, with the plaintiff, that the circular (containing the libel) was issued by the Penberthy people, in reference to a circular issued by the plaintiff.

The learned Judge left it to the jury to say whether they were satisfied on the evidence that Johnston “ was, at the time of publication, the general manager of the company—a person entitled to make admissions on behalf of the company—and whether he did make such statements, and whether, on the whole, you are satisfied that these defendants published that circular.”

The jury found for plaintiff. We have not the advantage of knowing the grounds on which the Divisional Court upheld the verdict against the strongly urged objection as to publication.

It is not easy to see how any authority can be inferred in a general manager or other officer of a bank or trading corporation of any kind to subject the corporation to actions for libel by his admission to any person that he had published a libel on another person by their authority.

If Johnston had been called, and had proved that he had been so authorized, or that it formed any part of his duty to do the act complained of, then the libel would be the act of his employers, the corporation. That the libel referred to the business of the company, and that it was apparently published in their interest, and to run down or depreciate a rival in business, does not in my mind bear upon the question. The shareholders or directors in the company cannot, without some sworn testimony, be held

liable for a libellous publication by their manager. Such a matter would be wholly foreign to the subject of their employment of him as their officer or agent. It was urged that *Tench v. Great Western R. W. Co.*, 32 U. C. R. 452, in Appeal 33 U. C. R. 8, was in favour of plaintiff. I have examined the judgments, but fail to see how they can help this case.

Judgment.

HAGARTY
C.J.O.

The General Manager Swinyard, who directed the publication of the alleged libel, was examined as a witness, as also were several of the directors, and the whole matter was fully explained. It was in a notice addressed to the company's servants announcing the dismissal of the plaintiff, one of their number. The manager swore it was his duty as such to issue this notice.

Draper, C. J., in appeal (p. 16), says : " It is, I think, satisfactorily shewn by the evidence of Mr. Swinyard, and of three others of the directors, that, as a board, the directors did not authorize the publication of the placard, but the chairman of the board gave evidence that the General Manager could, as a matter of duty, have dismissed the respondent on his own responsibility. The Board of Directors have, at least tacitly, acquiesced in the dismissal."

Gwynne, J. (p. 38), says that Swinyard swore it was his duty as manager to issue the notice complained of. The case was decided in the defendants' favour on privilege.

I think the principle deducible from the books is well stated in the last edition of Odgers, p. 416 : " A corporation will be liable to an action for a libel published by its servants or agents, whenever such publication comes within the scope of the general duties of such servants or agents, or whenever the corporation has expressly authorized or directed such publication."

A curious case is cited at p. 413, *Harding v. Greening*, 8 Taunt. 42. The defendant authorized his daughter, a minor, to make out his bills, and write his general business letters. She chose to insert libellous matter in one of the letters. The father was held not liable for the wrongful act of the daughter in the absence of any direct instructions.

Judgment.

HAGARTY
C.J.O.

If this verdict be upheld on the evidence merely of the manager's admission to others, it will, I think, carry the doctrine of a corporation's liability for a libel far beyond any case I have seen or been referred to.

I think the learned Judge should have dismissed the action as unsupported by any evidence of publication by defendants.

Appeal allowed with costs.

IN THE MATTER OF GODSON AND THE CITY OF TORONTO.

*Municipal corporations—Investigation by County Judge—Prohibition—
R. S. O. ch. 184, sec. 477.*

Where the County Court Judge is making an investigation pursuant to the resolution of a council under R. S. O. ch. 184, sec. 477, he is acting as *persona designata* and not in a judicial capacity, and is not subject to control by a writ of prohibition.

That writ is not to be applied to any proceedings of any person or body of persons, whether they be popularly called a court or by any other name, on whom the law confers no power of pronouncing any judgment or order imposing any legal duty or obligation on any individual.

Re Squier, 46 U. C. R. 474, considered.

Decision of ROBERTSON, J., reversed.

Statement.

THIS was an appeal from the order of ROBERTSON, J., directing a writ of prohibition to issue, prohibiting His Honour the Judge of the County Court of the county of York from further proceeding with any enquiry against A. W. Godson, under certain resolutions passed by the council of the city of Toronto, except in so far as might be necessary to enable him to proceed with the enquiry against William Lackie, named in those resolutions.

The resolutions in question were passed by the council of the city of Toronto, under the provisions of R. S. O. ch. 184, sec. 477, and, after reciting that one William Lackie had been guilty of malfeasance, etc., in relation to his duties as an officer of the corporation of the city of Toronto, and after reciting certain specific matters in regard to which

this malfeasance had occurred, directed the Judge of the County Court of the county of York to investigate and enquire into the matters and things referred to, and every matter and thing connected therewith, and also to make certain general investigations mentioned in the resolutions. Statement.

Upon the application of Godson, an order was made for the issue of a writ of prohibition as above stated, the ground being that the council should have formulated charges against the party whose conduct it wished inquired into. See 16 O. R. 275.

After this decision the council passed new resolutions making specific charges against Godson, and directing an investigation as to them, and also appealed to this Court against the order directing the writ of prohibition to issue. The County Court Judge also appealed against the order, and the appeals came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 27th of May, 1889, when a preliminary objection of the respondents, that the appellants had waived their right of appeal by passing the new resolutions, was argued, but not given effect to, and the appeal stood over and was argued on the merits on the 30th of May, 1889.

Aylesworth, and *Fullerton*, for the County Court Judge. Prohibition does not lie in this case as the County Court Judge is acting in a personal and not in a judicial capacity. The powers of the County Court Judge are merely inquisitorial powers, and he has no power to make any adjudication. The only power that he can exercise *in invitum*, is the power to compel the attendance of witnesses, and all that he does is to make a report of facts. He is in the same position as a commissioner who takes evidence for use in a foreign Court, who can compel the attendance of witnesses and take their evidence, but then merely returns the evidence to those from whom the duty of taking the evidence was derived. Under R. S. O. ch. 184, secs. 274 and 276, certain members of the council have power to take evidence,

Argument. and certainly in so taking evidence they could not be held to be acting in a judicial capacity, or to be subject to prohibition. Here the Judge merely acts in the same way with the additional power of compelling witnesses to attend. He is employed by and paid by the council, and acts as their servant, not as a Judge, and is only *persona designata*. Prohibition only applies where an inferior Court or tribunal is to be prevented from imposing a legal obligation on any complaining party: Shortt on Prohibition, p. 426; *Regina v. Local Government Board*, 10 Q. B. D. 309, at p. 321. The incidental power to impose the obligation of attendance does not put the person exercising that jurisdiction in a judicial position so as to make him subject to a writ of prohibition: *Ex parte Kingstown Commissioners*, 16 L. R. Ir. 150. *Re Squier*, 46 U. C. R. 474, relied on by the learned Judge is distinguishable. There the commission directed the investigation of specific charges, and really gave the commissioner power to remove the Judge from office so that there was power to impose a legal obligation. Moreover the objection that prohibition was not a proper remedy was not taken in that case, and the whole question turned on the legality of the commission itself, and the remarks as to the right to prohibit should be disregarded. See also *Ex parte Death*, 18 Q. B. 647; *King v. Justices of Dorset*, 15 East 594; *Chabot v. Morpeth*, 15 Q. B. 446; *Regina v. Hastings*, 6 B. & S. 401; *Osgood v. Nelson*, L. R. 5 H. L. 636; *Coté v. Morgan*, 7 S. C. R. 1; *Ex parte Bandlacht*, 2 Hill 367; *State v. Spearing*, 31 La. An. 122; *Siddall v. Gibson*, 17 U. C. R. 98; High on Extraordinary Remedies, 2nd ed., p. 603.

C. R. W. Biggar, for the City of Toronto, adopted the arguments of the counsel for the County Court Judge, and also referred to *Regina v. Bishop of Ely*, 1 Wm. Bl. 70; *Regina v. Bishop of Chester*, 1 Wils. 206; Report of the Oxford University Commission, Appendix B., p. 30.

Osler, Q.C., and T. P. Galt, for the respondent. Under section 477 the enquiry is to be made by the "Judge of the County Court," and clearly he acts in a judicial capacity.

He has to take evidence and weigh it, and come to a conclusion upon it. Under the sub-section of that section he is placed in the position of a referee as far as fees are concerned, and that also indicates that he is acting in a judicial capacity. Then the provisions of R. S. O. ch. 17 are incorporated, and under that Act he clearly has the highest judicial powers. He has power to have any person called as a witness, and has power to issue a warrant to compel the attendance of that person and to commit the person in case of default, and therefore he has power to impose an obligation. Clearly if the person sought to be prohibited has power to impose obligations, the writ of prohibition lies, and the "power to impose any obligation" referred to in the books cannot be limited to cases of power to give an official judgment but must certainly include wide powers of the kind referred to in this Act. The applicant here was being compelled to attend as a witness, and there was therefore jurisdiction to prohibit in that view. Prohibition will lie in interlocutory matters: *Anon.* 2 Salk. 553, or against a person assuming to exercise judicial functions: *Chambers v. Jennings*, 2 Salk. 553. *Re Squier* is not distinguishable. In that case there was a commission to take evidence, and to report the result of the evidence so as to enable another body to act, and the position is exactly analogous. See also *Osgood v. Nelson*, L. R. 5 H. L. 636; Bacon's Abr. Vol. 6, 584; Com. Dig. Vol. 7, 138; *State v. Young*, 29 Minn. 474.

Aylesworth, in reply.

June 29th, 1889. HAGARTY C. J. O. :—

I am unable to understand the principle on which it is argued that the writ of prohibition can be applied as it has been in the case before us, even on the widest definition which has ever been applied to it.

A very eminent English Judge, now Master of the Rolls, is referred to as having favourably spoken of the extent to which "the Court should not be chary" in exercising its

Judgment.

HAGARTY
C.J.O.

powers whenever any body of persons other than the Superior Courts, is entrusted "with the powers of imposing an obligation upon individuals."

We may fully accept this opinion without agreeing that any case has been disclosed within its scope.

We can see no obligation which the proceeding in this case can impose upon the applicant for the writ.

The exercise of a delegated authority to investigate matters which, in the opinion of the council, require investigation, as to their members, officers, or contractors, and to report to them "the result of the enquiry and the evidence taken therein," imposes no obligation of any kind recognizable by law on any individual whose conduct may be thus enquired into.

The report of the referee may furnish information and material to the council on which they may decide to take action, but any such action is wholly within their discretion. No case has been cited to us in the very full and able arguments addressed to us to sanction the claim of the applicant for this writ.

The learned Judge from whose decision this appeal has been brought, appears to consider the opinion of Chief Justice Sir Adam Wilson in *Re Squier*, as an authority for his decision. If it be susceptible of being so applied I must respectfully dissent from it to the extent to which it is sought to be applied.

It seems to me, and I think I may add to all the members of this Court, that the writ is not to be applied to any proceedings of any person or body of persons, whether they be popularly called a Court, or by any other name, on whom the law confers no power of pronouncing any judgment or order imposing any legal duty or obligation on any individual.

The case of *Ex parte Death*, 18 Q. B. 647, is very instructive. The Vice-Chancellor's Court of the University of Cambridge under a law of their own ordered that no person *in statu pupillari* should deal with, or buy, or sell with J. D. a tradesman in Cambridge on pain of suspension

or rustication; this was a proceeding called "discommuning." Judgment.
It was a most serious loss to the applicant whose chief HAGARTY
business was with the undergraduates. He applied for C.J.O.
prohibition, contending that the University authorities had
no power to pass the law in question: that he was not
duly notified of the proceeding: that they acted as a Court.

The application was refused with strong remarks by the Court. Lord Campbell said, if this law was a nullity does the case admit of prohibition? It was held it was not a judicial proceeding which the Superior Court could restrain by prohibition; that it did not matter that the substance of the proceeding must be looked to, not the form, &c., &c.

The case of *Coté v. Morgan*, 7 S. C. R. 1, goes to shew that the writ of prohibition must be confined to its peculiar province and character, and not extended to have the effect of mandamus or injunction.

The general law is well illustrated by such modern cases as *Regina v. Local Government Board* 10 Q. B. D. 309; *Regina v. Hastings, (Frewen's Case)* 6 B. & S. 401; *Ex parte Kingstown Commissioners*, 16 L.R. Ir. 150; in appeal, 18 *ib.*, 514.

In the Irish case it was held that a local board passing provisional orders which might or would lead to legislation, was not to be considered "a Court," and that "these powers in their very nature are not powers of determination, and not properly subject to restraint by way of prohibition." *Frewen's Case* was discussed and relied on.

Palles, C. B., at p. 157, of the case in the Court below, very fully discusses the point whether the Local Board was a Court and its act a judicial proceeding. It had powers to take evidence on oath, summon witnesses, produce proof, &c. It was a body appointed by Parliament to make preliminary enquiries in relation to applications for intended local and personal bills, and in certain cases to make provisional orders in reference to them, but such order was to be of no force until confirmed by Parliament. He says, at p. 158: "In my opinion such an order is not a

Judgment.

HAGARTY
C.J.O.

'determination' sufficient to erect into a Court the body empowered to make it, and to such a body not being a Court, the writ of prohibition cannot go."

He notices at length the remarks of Lord Esher, in *Regina v. Local Government Board*, 10 Q. B. D. 309: "The words which I have emphasized—viz., 'the powers of imposing obligations upon individuals,' appear to me to be no more than a cautious and, if I be permitted to say so, an accurate description of the nature of the body to which at common law the writ of prohibition is permitted to go." *Mayor of London v. Cox*, L. R. 2 H. L. at p. 278, may be referred to.

The general law is very fully discussed in Shortt on Prohibition, p. 426, *et seq.*

The only question requiring decision at our hands is whether the writ of prohibition can be supported. It is not necessary to discuss several other questions incidentally raised, as to the powers to enforce attendance of witnesses, production of documents, &c. Their consideration is not involved in the present appeal. Nor are we to be drawn into a discussion of the justice or injustice of the charges or proceedings, or of the course said to be pursued in this enquiry.

We hold it to be reasonably clear as law that the enquiry held by the County Court Judge on a reference to him by the corporation is not the subject of prohibition. His duties under such reference are to take evidence and report the result of his enquiries with the evidence to the council. That is the extent of his functions. In so doing he neither can nor does impose any legal obligations on any individual.

Speaking for myself I think it right to add that I cannot understand why when the municipality direct an enquiry into the conduct of any of their officers or servants in their superintendence of city works, or their dealings with city contractors, the enquiry must always stop when it discloses any conduct of such official in reference to a contractor, or to such contractor's performance of his contract, or to the

manner in which his work was passed or certified by any city official. Nor can I see why in enquiring into the conduct of one of their officers the investigation must be stopped if it be carried into a matter shewing a fraud attempted by a contractor against whom no formal charge is laid before the referee.

Judgment.

HAGARTY
C.J.O.

Very large powers are given as to the matters to be referred, and I refer to section 2 of the reference in this case, which extends it beyond the special matter in section 1 as to Lackie.

To cut short an enquiry as soon as any particular contractor is named, appears to me to be a short and easy method of ensuring the failure of the enquiry.

Contractors must be assumed to be aware of the large powers given to municipalities as to these enquiries and references. They have no more right to stop them by prohibition than they would have to prevent the corporation itself, or a committee appointed for the purpose, from hearing the evidence of witnesses voluntarily appearing before them on an enquiry into the general character and conduct of contractors or of the officers appointed to superintend their work.

Contractors will be reasonably protected in person and property and character, by a resort to the ordinary laws of the land, without the writ of a Court of Justice prohibiting enquiry into their dealings with the municipality.

BURTON J.A. :—

The learned Judge below seems to have been influenced by what he supposed to be a decision of Sir Adam Wilson, reported in 46 U. C. R. 474, which he considered binding upon him, and which he was bound to follow.

The cases referred to in the judgment of Sir Adam Wilson by no means support the view that a writ of prohibition was the appropriate remedy in that case, but he came to the conclusion that the government had no power to issue the commission which was then in question, and I

Judgment.

BURTON
J.A.

should say that the inclination of his mind was that a writ of prohibition might properly be applied for, but he did not so decide, for he concludes, "but I shall reserve that part of the case, as it may be unnecessary absolutely to determine it, and will afford the parties an opportunity of knowing what my opinion is against the validity of the commission to determine what course they may wish to take concerning it."

Although, therefore, there was undoubtedly a strong expression of opinion by Sir Adam Wilson, it left Mr. Justice Robertson perfectly free to exercise his own judgment, and it is to be regretted, I think, that he had not done so, as I think an independent investigation of the subject must have satisfied him that this case, at all events, was not one in which prohibition would lie, for the very reason which the learned Judge in the course of his judgment recognizes as law, viz., that the writ will only go when the Legislature entrusts to any body of persons, or any person or functionary other than the Superior Court, the power of imposing an obligation upon individuals.

The Legislature has empowered the city council to issue a commission to the County Court Judge to make the enquiries which were directed in this case; but the Judge's functions under it, are confined to making those enquiries and reporting the result to the council. In so doing he is not acting judicially, nor has he power to impose any obligation upon any one for anything upon which he reports.

On the short ground, therefore, that the Judge was not a Court or exercising any judicial functions, and could not make any determination or decision upon the evidence submitted to him imposing any obligation upon any one, I think it clear that the proceeding was unwarranted, and that the appeal must be allowed and the judgment reversed with the usual consequences as to costs.

OSLER J. A. :—

Judgment.

OSLER
J.A.

As I understand my brother Robertson's judgment he would not have decided this case otherwise than as this Court is now deciding it if he had followed his individual view, but sitting as a single Judge he conceived himself to be bound by an expression of opinion by the late learned Chief Justice of the Queen's Bench Division in the case of *Re Squier*, which, however, seems to me, as I believe it does to all of us, inapplicable. It is perfectly clear that the proceedings of the County Court Judge under this statute are not examinable in prohibition.

He is merely *persona designata* to conduct an enquiry, and apart from the fact that he has been selected by the Assembly as a person who, from his training and position, is likely to conduct it in a judicial spirit, it is a mere accident that it is not being conducted by an alderman or committee of the council, or any one else who is not a Judge. His proceedings can legally affect no one either in purse or person. He is not acting or assuming to act in a judicial capacity in taking the evidence or in making his report, and he can impose no obligation on any body beyond that of appearing to give evidence.

If he goes beyond his authority, that is his own concern. It must be enquired into and answered in another way; the Court cannot interfere by prohibition, which is the mode of proceeding to which my observations are confined.

The limits of that jurisdiction have been much discussed of late years, and the principles on which the Court acts are, I think, well settled. I had occasion to consider them recently in the case of *The Bell Telephone Co.*, 7 O. R. 605.

Of the numerous authorities which might be cited it is, I think, sufficient to refer to two: *Regina v. Hastings*, 6 B. & S. 401; *Regina v. Local Government Board*, 10 Q. B. D. 309.

Other points were argued in the case, into the discussion of which I do not enter, as the only one which can be said

Judgment.

OSLER
J.A.

to invite decision is whether prohibition lies. I must add, however, that the appeal appears to me to be entirely gratuitous, the scope of the enquiry having been enlarged by the city council since the judgment in such a way as to preclude all possible objection on the part of the applicant for the writ, with whose rights alone we are concerned.

As however it has been determined to entertain the appeal, I think it must be allowed.

MACLENNAN J. A. concurred.

Appeal allowed with costs.

HAY V. BURKE.

Bills of exchange and promissory notes—Notice of dishonour—To what place to be addressed—Place designated under signature—R. S. C. ch. 123, sec. 5.

Where it is intended to designate under the provisions of R. S. C. ch. 123, sec. 5, a place to which notice of dishonour may be sent other than the place at which the bill or note is dated, it is sufficient if the name of a place is written under or beneath the signature of the party. "Under his signature" does not mean that the name of the place must be written by the party's own hand; it may be written by another person if that other person had in any manner any kind of authority from the party to write it.

Where a place has been so designated by any party, the holder of the instrument may send notice to that place, even if he has reason to think or even knows that such place is not the party's place of residence or place of business.

Cosgrave v. Boyle, 6 S. C. R. 165, considered and applied.

Judgment of the First Division Court of Wentworth affirmed.

THIS was an appeal by the defendant from the First Statement
Division Court of Wentworth, and came on to be heard
before MACLENNAN, J.A., on the 14th of September, 1889.

Mackelcan, Q.C., for the appellant.

G. F. Shepley, for the respondent.

September 21st, 1889. MACLENNAN J.A. :—

This case was heard before His Honour Judge Muir, with a jury, and the verdict was for the plaintiff. The action was against the defendant as endorser of two promissory notes for \$98.50 each, and the question was whether the defendant had due notice of dishonour. The defendant was a vendor of patent rights and travelled about the country a good deal, and the notes had been received by him in the course of his business from a farmer. The defendant sold and endorsed the notes to one Taylor who transferred them to the plaintiff for value before maturity. When the notes came into the possession of the plaintiff there was written under the defendant's endorsement on each note, the words "Toronto P. O.," and the notice of dis-

Judgment. honour which was given to the defendant at the maturity
MACLENNAN of the notes was in each case addressed to him at Toronto.
J.A. The question at the trial was whether that notice was sufficient, no other notice having been given. It was not disputed that the words, "Toronto P. O.," were on the notes when they were acquired by the plaintiff, and were written by Taylor, but the evidence was conflicting as to the circumstances under which they were written. Taylor swore that he bought four notes altogether from the defendant, two on the one day at Seaforth, and two others on the following day at Clinton, and the notes in question included one of the first and one of the subsequent purchase. He swore that on the occasion of the second purchase when the business was about completed he asked the defendant what his address was and the defendant told him Toronto, and that he wrote it down upon the notes under the defendant's signature in his presence. The defendant denied this account of the matter and said that he and Taylor exchanged their respective addresses written on a piece of paper: that the address he gave Taylor was Stratford and not Toronto: that his true address at that time was Stratford, and he denied ever having received the notices of dishonour which had been sent to Toronto. An attempt was made to fix the plaintiff with knowledge or notice that the defendant had changed his place of residence from Toronto to Stratford, by shewing that on or about the 14th of June, 1882, the defendant had written a letter to the plaintiff dated at Stratford, but the plaintiff denied receiving this letter, and all knowledge of the defendant's address other than as indicated upon the notes.

The case was first tried before the learned Judge without a jury, and he gave judgment for the plaintiff. On the application of the defendant he granted a new trial, and it was tried a second time with the aid of a jury, and with the same result as before.

The principal contention by the plaintiff's counsel at the trial was that what took place between the defendant and Taylor at Clinton, when Taylor wrote the address

which the defendant gave him under his endorsement upon the notes, brought the case within the 5th section of the Act relating to Bills and Notes, ch. 123 of the R. S. C. The defendant's counsel contended that there was no evidence to go to the jury under that Act, and that the case should be withdrawn from the jury and the action dismissed.

Judgment.

MACLENNAN
J.A.

The learned Judge declined to accede to the defendant's contention and after drawing their attention to the statute, and also very fully and fairly, as I think, to the conflicting evidence, told the jury that "under his signature" in the statute meant the writing of the name of a place under or beneath the endorsement, that it did not mean that it must be written by the endorser's own hand, and that it might be written by another person if that other person had in any manner any kind of authority from the endorser to write it. He also told them it was for them to say whether what took place when Taylor wrote the name down amounted to a designation by Burke of his address, and that if they thought so they should find for the plaintiff, but if otherwise, for the defendant.

The jury having found for the plaintiff, the defendant moved against the verdict but without success, and hence the present appeal.

I have read and carefully considered the evidence, and also the charge of the learned Judge, and I am of opinion that the verdict was right, and ought not to be disturbed, and that this appeal must fail. I think there was evidence to go to the jury, that the words "Toronto P. O.," were written upon the notes by Taylor with the knowledge and consent of the defendant as his address for the purpose of the notes, and I think that under the charge of the learned Judge it was competent to the jury to find a verdict for the plaintiff as they did. The evidence, if believed by the jury, as it was, in my judgment brought the case within the fifth section of the Act, and the plaintiff was warranted in directing the notice of dishonour to Toronto, even

Judgment. if he had reason to think, or even knew, that Toronto
MACLENNAN was not the defendant's residence or place of business.
J.A.

Independently of the statute, a notice of dishonour may be given either at the party's residence, or at his place of business, or it may be delivered to him personally anywhere, or it may be directed to any place whatever designated by him for the purpose, and he may waive notice altogether: Byles, 13th ed., pp. 284-5. The statute enlarges the facilities for giving a valid notice, and I think the case of *Cosgrave v. Boyle*, 6 S. C. R. 165, decides that notice under this statute is good, though the holder knows that the place designated on the note is not the residence or place of business of the party.

The case just referred to is very instructive on this question of notice of dishonour. It establishes the proposition that apart from the special Act of Parliament, the question is always one of due diligence on the part of the holder, having regard to considerations of mercantile convenience, and it was there held that the holder of a note who without negligence is ignorant of the death of an indorser may address notice to the deceased. In accordance with the reasoning in that case, I think mercantile convenience requires that the holder of a bill or note acting in good faith, may safely assume that the address written under the signature of any of the parties to it, was put there either in pursuance of the statute or as the result of correct information obtained to further the negotiable character of the instrument, and that the inconvenience would be intolerable if bankers and others were obliged at their peril to enquire into the correctness of such addresses or into the circumstances under which they were written.

In *Ex parte Baker*, 4 Ch. D. 795, seven bills of exchange had been discounted by a bank. They had in their books as the drawer's address, "The Oak Brewery." Four months before the date of the bills, the drawer had parted with the Oak Brewery, and had never been there afterwards. Before the bills, which were four months bills, matured, the drawer became bankrupt and his estate was vested in

a trustee. Notice of dishonour was addressed to the drawer at the "Oak Brewery." It was contended that the notice should have been given to the assignee, and that at all events it was not sufficient to direct it to the "Oak Brewery." The Court of Appeal held that the notice was properly given to the bankrupt, and that it was sufficiently directed to the Oak Brewery. Mellish, .L. J., said, "I think also that it was sufficient for the bank to send the notice to the 'Oak Brewery,' *because it was the only address they knew.*" In 2 Daniel on Negotiable Instruments, 2nd ed., at p. 76, it is said: "When the address of the notice corresponds with the address which has been placed by the party upon the bill as an indication, as for instance "W. Moors, Manchester," or "T. M. Barron, London," it would be sufficient to follow it. At least a jury might infer due notice," citing *Mann v. Moors*, Ryan & M. 249; *Burmester v. Barron*, 17 Q. B. 878. And in New York it is sufficient if the holder send notice to an indorser at the address given to him by the person from whom he receives the bill, though the address be altogether wrong. See *Bank of Utica v. Bender*, 21 Wend. 643, and other cases cited in Vol. 2, sec. 1032 of Daniel. And see also Chalmers on Bills, 2nd ed., p. 160.

Judgment.
MACLENNAN
J.A.

I think, therefore, that not only was the learned Judge's charge to the jury unobjectionable, and the finding of the jury well warranted by the evidence, but I am also of opinion that the learned Judge might have left it to the jury more favourably for the plaintiff than he did. He might have told them that if they believed the defendant named Toronto to Taylor as his address, and if that was communicated to the plaintiff in any manner, and if when the notes fell due the plaintiff knew of no other address, then he was entitled to recover without the aid of the statute. See also *Berridge v. Fitzgerald*, L. R. 4 Q. B. 639.

Appeal dismissed with costs.

IN THE MATTER OF HARVEY AND MITCHELL AND THE TOWN
OF PARKDALE.

Municipal corporations—Expropriation of one foot strip of land across street—Quantum of damages—Local improvements.

The appellants, the owners of a block of land, laid it out in building lots, dedicating as a street, called D. street, a portion of the land running through it from a street on the east to within one foot of its west limit, the one foot being reserved because at that time, W., the owner of the land adjoining on the west, refused to dedicate any portion of it for the purpose of carrying D. street through to the next street to the west. Subsequently the owner of the land adjoining laid out his property in building lots, dedicating as a street, also called D. street, a portion of it running (in the same line as the portion dedicated by the appellants), through it from the street on the west to within one foot of its east limit, the one foot reserved by him immediately abutting on the strip reserved by the appellants. Subsequently the appellants sold all their land except the one foot strip and afterwards the corporation expropriated the two strips to make D. street a thoroughfare, and the appellants in an arbitration under the Municipal Act were allowed merely nominal damages for their strip :—

Held, (BURTON, J.A., dissenting), that this was right, there being no evidence that the property had any market value in the hands of the owners or was worth anything except for the purpose of opening the street or that it was capable of being put to any other use whatever. The higher price that the appellants might have obtained for their lots if the street had been made a thoroughfare before the lots were sold, or the price that the residents on the street might be willing to give to have the obstruction removed, could not be considered as elements in fixing the damages.

Per OSLER, J. A.—The appellants' foot of land was useless for the purpose of extending the street so long as W.'s reserve stood in the way ; and the contingency of W. selling it, depending, as it did, upon the volition of a person over whom the appellants had no control, was too uncertain to be taken into account as an element of value.

Per OSLER, J. A., also—Where works are done under the local improvement clauses of the Municipal Act, compensation for property expropriated is to be ascertained in the same manner, and by the application of the same principles, as in cases where the corporation are not acting under those clauses, and this whether the corporation initiate the proceedings or they are put in motion by the petition of the parties who desire the improvements to be made. There is nothing to justify the notion that in the latter case more is to be paid for the work than if the cost had to be borne by the corporation.

Order of BOYD, C., affirmed.

Statement.

THIS was an appeal from the judgment of BOYD, C., reported 16 O. R. 372.

Harvey and Mitchell, being the owners of a certain block of land in the town of Parkdale, situated on the west side of Sorauren Avenue, laid it out in building lots in the year 1881, dedicating as a street called Duncan

street, a portion of the land running westward from Sorauren Avenue to within one foot of the west limit of the land. One Wright was at that time the owner of the land situated on the east side of Roncesvalles Avenue immediately to the west of the land owned by Harvey and Mitchell. Harvey and Mitchell asked Wright several times to dedicate a portion of his land as a street so as to form a thoroughfare from Sorauren Avenue to Roncesvalles Avenue, but Wright refused to do this, and Harvey and Mitchell accordingly reserved the one foot strip at the western end of the street laid out by them for the express purpose, as they said, of preventing an unfair advantage being taken of them whenever Wright might wish to extend the street through his property. They afterwards sold all their land except this one foot strip. In 1887 Wright laid out his land in building lots and opened a street, also called Duncan street, in a line with that dedicated by Harvey and Mitchell, from Roncesvalles Avenue to within one foot of the east limit of his land, the strip one foot wide reserved by him being alongside of that reserved by Harvey and Mitchell. Statement.

In October, 1887, the corporation of the town of Parkdale upon a petition of the owners of land benefited by the proposed improvement, passed a by-law under the provisions of the Local Improvement Clauses of the Municipal Act providing for the grading and paving of Duncan Street and the expropriation of the two one foot strips. Under this by-law proceedings were taken for the expropriation of these two strips, and an arbitration was had between the appellants and the corporation. There was no evidence that the strip in question was in itself of any market value or was capable of being put to any practical use, but it was proved that if the street had been a thoroughfare at the time their land was sold by Harvey and Mitchell, they would have obtained a higher price for it ; and it was also proved that opening the street as a thoroughfare would have the effect of increasing the value of the land abutting on it. The majority

Statement. of the arbitrators made an award allowing only \$1.00 as compensation to Harvey and Mitchell, while the third arbitrator dissented, holding that the land had a special value and that what the owners of the land along the street would be reasonably willing to pay to have it made a thoroughfare, would be the true way to find its value.

Harvey and Mitchell moved against this award, but their motion was dismissed with costs.

Their appeal from the order dismissing this motion came on to be heard before this Court (HAGARTY, C. J. O., BURTON, and OSLER, JJ.A., and PROUDFOOT, J.,) on the 14th of May, 1889.

The Attorney-General for Ontario, (Mowat, Q.C.) for the appellants. It is true that the strip in question yields nothing to the appellants, but that is not the test; the possibilities must be considered. It is not a matter of speculation but a matter of certainty that this strip would ultimately be taken for the street, and therefore the owners were entitled to hold it for this purpose, and should be allowed such sum as the property is worth, having regard to this prospective capability: *The Queen v. Brown*, L. R. 2 Q. B. 630; *Ripley v. Great Northern R. W. Co.*, L. R. 10 Ch. 435; *Mayor of Montreal v. Brown*, 2 App. Cas. 168; *Morrison v. Mayor of Montreal*, 3 App. Cas. 148; Lewis on Eminent Domain, sec. 478; *Boom Co. v. Patterson*, 98 U. S. at p. 408. The cases of *Wadham and North Eastern R. W. Co.*, 14 Q. B. D. 747; 16 Q. B. D. 227, and *The Queen v. Poulter*, 20 Q. B. D. 132, are distinguishable. These were cases of land being injuriously affected, and not, as this is, of land being actually taken. Here the privilege of crossing is of great value and substantial compensation should be given. The value for this purpose has been created by the appellants by opening the street through their own land, giving up the land for the street and selling lots at a comparatively low rate. To refuse substantial compensation virtually amounts to confiscation. Where the value is a mere accident it is properly dis-

allowed, as in *Penny v. Penny*, L. R. 5 Eq. 227, but that Argument is not this case. The case of *Stebbing v. The Metropolitan Board of Works*, L. R. 6 Q. B. 37, does not govern this case as is contended. There the land never was the Rector's, and it was secularized only for a particular purpose and not generally. This is an attempt by the adjoining owners to take advantage of the expropriation clauses and by means of the action of the corporation to evade payment of what they would have been willing to pay for this privilege, if they had as private individuals been endeavouring to obtain it.

(The learned counsel then argued that owing to certain informalities in connection with the proceedings, the award could not stand, but the objections were afterwards withdrawn.)

J. H. Macdonald, Q. C., and *C. R. W. Biggar*, for the respondents. The only question is, what is the value of this strip to the appellants or to any other owner, and not what is the value to the public. Every possible use or future capability should be considered, but not a mere fictitious value, owing to the fact that the strip if not removed would be a nuisance. This strip could never be of any practical use, and could not be of any value even as a barrier because the adjoining strip would still remain. The possible right to obtain payment from persons desiring to cross is altogether too speculative. Utility is the test all through the cases: *Lewis on Eminent Domain*, sec. 478; *Mills on Eminent Domain*, 2nd ed., sec. 174; *Lloyd on Compensation*, 5th ed., p. 69; *Woolf and Middleton on Compensation*, p. 119.

The Attorney-General for Ontario, in reply.

October 12th, 1889. HAGARTY C. J. O.:—

I agree in the judgment about to be delivered by my brother Osler, and also with that of the learned Chancellor.

I am unable to understand any intelligible rule for the

Judgment.

HAGARTY
C.J.O.

valuation of property to be expropriated except that adopted in the Court below.

A man owns a strip of land, one foot wide, across the centre of a street. He has previously sold all his land on the street except that foot. As against a public body, in whom the care and management of the public streets is vested, with powers of expropriation, I cannot see what can legitimately be considered in deciding what they must pay for the removal of that obstacle except its actual value to the owners. I fully recognize the principle laid down in such cases as *Ripley v. Great Northern R. W. Co.*, L. R. 10 Ch. 435, as to the right to consider any purpose or use whatever to which the property in question could be reasonably put or applied, or for which it was peculiarly adapted and might hereafter be available. But the considerations urged on behalf of the appellants as to matters that had previously occurred—as to their sale of their land on either side of the street; as to any higher price that they could probably have obtained if the street had been opened throughout; as to the reasons which induced them to reserve this otherwise wholly useless foot of land; and as to what parties interested in lots on the street might pay them to get this foot removed—all these seem to me, with much respect for those who hold a different opinion, beside the question on an enquiry as to value when it is sought to be expropriated.

A man might possess a large and most unsightly set of buildings in which he carried on a business, not necessarily indictable as a nuisance, but offensive and of evil repute. He might be surrounded by handsome residences, gardens, etc. Expropriation is resorted to either for a railway or for corporation purposes. I cannot believe that he could be heard to urge as an element of value that, if they would let him alone, he would be sure to receive a large sum from the surrounding wealthy landowners to induce him to sell or remove his objectionable premises. Every lawful use to which his property could be applied might be properly considered or to which it was specially

adapted, but nothing in the nature of the argument to which I have just adverted.

Judgment.

HAGARTY
C.J.O.

I think the appeal must be dismissed, but without costs as suggested by my brother Osler.

PROUDFOOT J.:—

I think the judgment right.

The principle of compensation is to ascertain what the market value of the property was to the owner; if the owner could make no use of it, though the corporation might, he would only be entitled to nominal damages: *Stebbing v. The Metropolitan Board of Works*, L. R. 6 Q. B. 37; Dillon on Municipal Corporations, 2nd ed., sec. 486, *et seq.*

The owners appear to claim as damages the higher price they could have got for the property if the street had been opened through when they sold. But that is all past; they need not have sold at all, and if they chose to part with their property, it is impossible now to claim compensation for that loss.

This strip of one foot in width is of no practical value to the owners. They cannot cultivate it. They could only use it as an obstruction, but that is not a subject of compensation. No evidence has been given to shew that it is of any marketable value at all. The evidence seems to have been directed to shew how much more might have been got for the lots sold. There is no evidence that the purchasers are willing to give any further sum than may be assessed by the arbitrators. Mr. Boswell's certificate or minority award says that this foot has a special value. "What the owners of the land along the street would be reasonably willing to pay to have it made a thoroughfare is the true way to find the value of the land in question." Assuming that to be the test, I find no evidence of the willingness of the purchasers to pay the sum of \$2,000, which he fixes upon, or indeed any sum apart from the arbitrated one.

Judgment. I think the Chancellor has taken the correct view of the **PROCDROOT J.** case in this respect, and as to the other matters that were argued.

OSLER J. A. :—

I shall say in the first place in answer to some arguments which have been addressed to us, that in my opinion where works are done under the Local Improvement Clauses of the Municipal Act, compensation for property expropriated is to be ascertained in the same manner, and by the application of the same principles, as in cases where the corporation are not acting under those clauses ; and this, whether the council initiate the proceedings or they are put in motion by petition of the parties who desire the improvement to be made. In making the improvement, which is in this case the extension of a public street or highway, the council are merely exercising the general power which the Act confers upon them of opening or extending streets. In doing the work as a local improvement under section 612, they are merely in their discretion throwing the cost of a public work upon the parties more immediately benefited instead of upon the general body of the ratepayers. There is nothing in the Act which justifies the notion that in such case the former are to pay more for the work than if the cost had to be borne by the latter.

The council then having lawfully expropriated this foot of land, and being bound by law to make compensation for any damage which has necessarily resulted to the appellants from the exercise of their powers, how is that compensation to be ascertained? I have said that the case is a peculiar one, because the damage which the appellants themselves seem chiefly to insist upon is the loss of the right to maintain the land as an obstruction, by doing which the property owners on the street might be induced for the sake of their own convenience to pay the appellants something for the privilege of removing it.

The case may, in my opinion, be disposed of on the ground that the only elements of damage attempted to be proved were shewn to be non-existent. The appellants had long since sold all the rest of their land, and even if before selling any of it, they had dedicated the street throughout the whole width of the block, they could not on that account have obtained higher prices for their lots, since Wright's land was still in the way. For the same reason, the foot of land actually reserved was of no value to the lot owners or to the appellants, as it would evidently have been useless for the former to buy it unless they could also have made an arrangement with Wright, a contingency which, depending as it did upon the volition of a third person over whom the appellants had no control, was altogether too uncertain and hypothetical to be taken into account as an element of value: *Munkwitz v. Chicago Milwaukee & St Paul R. W. Co.*, 64 Wis. 403; *Watson v. Milwaukee & Madison R. W. Co.*, 57 Wis. 332; *Central Pacific R. W. Co. v. Pearson*, 35 Cal. 247.

Judgment.

OSLER

J. A.

What the owner is entitled to is the fair market value of the land, having regard to its capabilities, present and prospective: *Ripley v. Great Northern R. W. Co.*, L. R. 10 Ch. 435; *Mayor of Montreal v. Brown*, 2 App. Cas. 168; *Morrison v. Mayor of Montreal*, 3 App. Cas. 148; *Penny v. Penny*, 37 L. J. Ch. 340-3:—and upon the assumption that it is not going to be taken compulsorily; that is to say, the use for which the expropriator requires it is not an element of value taken by itself, and in the absence of a similar use attaching to it as an element of value to other possible purchasers; for, if it were, the owner would be measuring his demand not by his own loss but by the taker's gains. There was here no evidence that, as land, the appellants' strip of ground was capable of being put to any use whatever, except as part of the highway. Its situation and size equally precluded its use for either building or agricultural purposes. Counsel did indeed suggest on the argument that it might possibly be used to establish a gate or bar across it for the purpose of collecting tolls, but the

Judgment.

OSLER
J.A.

appellants doubtless felt that a claim based upon a use of that kind, if it ever occurred to them, was too shadowy and unreal to lay before the arbitrators. They owned no land on either side of the strip. Wright's strip of land also stood in the way, and, therefore, for all practical purposes it would be useless or impossible to erect or maintain a gate or bar on their own.

Where then is the evidence that this piece of land, whether an inch or a foot in width, had a market value for any purpose, *rebus sic stantibus*? I do not allude to the \$100 spoken of by one witness, or \$16 or \$18 by another. That is not the appellants' idea of substantial damage, nor is it suggested that the arbitrators erred in not awarding one or other of these sums. But taking the land as it stood, it must be pointed out that there was no evidence (and I suppose for the best of all reasons) that any person or any number of persons was or were or would be willing or ready to give anything for it, either for the purpose of making the street one foot longer, or for what it might be worth on the chance of being able to buy the adjoining strip from Wright—conceding that it had a “prospective capability” for use as part of the street, if Wright would also sell—in short no evidence that any body would give anything for it, either for itself or on the chance that Wright would also sell.

The witness Lucas, indeed, said that he thought the two feet reserve was worth (as he expressed it) \$7,000 to \$8,000 to the whole of the property owners on Duncan street. That may be so. Yet it does not follow that the appellants, who have long since parted with their lots, can measure their damage by what the purchasers would gain from a thoroughfare they never could have given them. So too when the same witness says further on that if he owned property on Duncan street he would be willing to have it assessed ratably with the other land on the street for \$7,000 or \$8,000, in order to get a thoroughfare, he is not giving evidence of the market

value. No one person would give such a sum, and *non constat* that any other, or even all of the proprietors would have been willing to join in doing so, either for one foot or both. We have to guard against allowing the idea of the power of expropriating other land along with the appellants' land, to enter into estimate of value. What could they have sold their own for, it being in their own hands? That is the question, and I think that if left alone, as the plaintiff in *Ripley's* case desired to be, there is no evidence that they could have sold it for anything. I think we should dismiss the appeal; but inasmuch as on the argument the technical objections to the proceedings were abandoned, I think it should be dismissed without costs.

Judgment.

 OSLER
J.A.

I refer also to the following cases: *Goodin v. Cincinnati and Whitewater Canal Co.*, 18 Ohio St. 169; *Gardner v. Brookline*, 127 Mass. 358; *Moulton v. Newburyport Water Co.*, 137 Mass. 168; *Sullivan v. Lafayette County*, 61 Miss. 271.

BURTON J. A.:—

The broad question raised upon this appeal is, whether the appellant is entitled to substantial as contrasted with nominal damages. If anything beyond nominal damages had been given, this Court would not interfere with the amount awarded, although, if disposing of the matter originally, they might have come to a different conclusion from the arbitrators, but the question here is one of principle, and it is no doubt of great and general importance.

I frankly admit that, until the argument of this case, I was under the impression that the Local Improvement Clauses of the Municipal Act were confined to making improvements upon streets already in existence, and that they did not extend to the expropriating of lands for the purpose of making a new street. The recent legislation, however, would seem to go fully that length, and is a great departure from what has hitherto been regarded as

Judgment.

BURTON
J.A.

the law applicable in such cases—viz., that no private property shall be compulsorily taken except for those great public emergencies which can be reasonably met in no other way. The present legislation seems to vest in a few individuals the power to use the general municipal authority to condemn private property, not for the general public, but for the benefit of those individuals.

This is a very radical change and may possibly be open to grave abuse, but we are only concerned with it in this way—that there would seem to be no reason for placing a very strict limit upon the compensation to which the proprietor should be entitled as against the persons who have put the law in motion, and are, by their own admission, the parties to benefit by the expropriation.

I do not think there is much difference of opinion between myself and the learned Chancellor as to the law regulating the mode of arriving at the proper measure of compensation. It is in the application of it that I feel myself unable to agree with him. I quite agree with the quotation that he makes from Chief Justice Gockburn's judgment in *Stebbing v. The Metropolitan Board of Works*, L. R. 6 Q. B. 37, that when Parliament gives compulsory possession and provides that compensation shall be made to the person from whom the property is taken for the loss that he sustains, it is intended that he shall be compensated to the extent of his loss, and that his loss shall be tested by what was the value of the thing to him, not by what will be its value to the person acquiring it.

So, also, with the quotation from Mr. Cooley's work: "The value of the land is to be assessed with reference to what it is worth for sale, in view of the uses to which it may be applied, and not simply in reference to its productiveness to the owner in the condition in which he has seen fit to leave it."

These views appear to me to be perfectly sound in principle, but they leave untouched the question of what was the marketable value of this strip of land to the appellants.

I pointed out during the argument that in a case of the kind I am about to refer to, a piece of land might yield no return to the proprietor and might be of little use except for a particular purpose, and yet it would seem quite out of the question to say that he was not entitled to substantial compensation.

Judgment.

BURTON
J. A.

Take, for instance, a very steep and almost inaccessible piece of land which, although useless for almost any other purpose, might be specially valuable as a site for a lighthouse or an observatory. Is the rule I have quoted to be pushed to the extent contended for, because, though useful to the purchaser, it was of no present value to the owner, who, perhaps, with more foresight than others, has for years looked forward to its being required for such a purpose?

It is clear that it was competent to the appellants to have placed a bar across the street over this strip of land, and exacted toll from any person desiring to pass, and that that being an element in the case, it was not one in which it could be said, arbitrarily, that they were not entitled to any compensation.

But I think it is not an unreasonable view of the matter to look at it in this way. If there had been no power to take this piece of land compulsorily, the persons benefited by its being given for use as a street would gladly have paid a considerable sum for its acquisition. It would have had that marketable value to the owner, but he might, of course, have refused to sell at all, or only on payment of an exorbitant and unreasonable sum. The Legislature then steps in and says you must sell, but we will secure to you the means of getting reasonable compensation. Surely it can scarcely be urged that what these persons were willing to pay in order to secure the benefit of the opening of the street is unreasonable for him to receive or for the arbitrators to award.

The legislation is for the purpose of preventing an owner demanding and extorting an unreasonable and unjust price, and thus stopping improvement, and not of depriving him of compensation altogether.

Judgment.

BURTON
J. A.

It may be quite true as the learned Chancellor remarks, that it would be erroneous to base any estimate of damages on the increased amount which the appellants might have obtained on selling their lots if they waited till the street was opened through, but one cannot shut one's eyes to the fact that the persons now seeking to have this piece of land opened up, are not only the parties who have purchased these lots at a reduced value in consequence of its not being opened at the time of their purchase, but the persons who own lots on the new extension, and that Mr. Wright, the adjoining proprietor, who refused at the time to join in opening the street, and who is one of those from whom the compensation is demanded, has not only injured the appellants in the past, but is now depriving them of all remuneration for this strip of land, without which the portion of the street which he now desires to open, would be comparatively valueless.

The case of *Stebbing v. The Metropolitan Board of Works*, L. R. 6 Q. B. 37, is one of a very different character. The claimant in that case was Rector of a parish, and in that character the owner of certain churchyards in which burials were prohibited by order in council. He had no power to dispose of them, and therefore to him they were perfectly valueless. The Board of Works were authorized to take portions of them for the purpose of forming a new street. It was in fact authorizing them to take for a new public purpose land which had been previously dedicated to another public purpose. The Rector had no beneficial interest in it; he suffered no loss, and therefore could be entitled to no compensation.

It was in such a connection that we find the language cited by the Chancellor made use of, viz., "the question is not what the persons who take the land will gain by taking it, but what the person from whom it is taken will lose by having it taken from him."

Here, if the persons interested were willing to give a certain sum if they had not power to take it compulsorily, it can scarcely be said that the appellants lost nothing by having it taken from them.

The language of Cockburn, C. J., in *The Queen v. Brown*, L. R. 2 Q. B. 630, I think, fully supports this view when he says: "A jury * * in assessing the amount to which the landowner is entitled, have to consider the real value of the land, and may take into account not only the present purpose to which the land is applied, but also any other more beneficial purpose to which, in the course of events at no remote period it may be applied, just as an owner might do if he were bargaining with a purchaser in the market."

Judgment.

 BURTON
J. A.

This piece of land has a special value by reason [of its being between the termini of two roads, the joining of which the proprietors on both streets shew by their petitions they are very desirous to procure.

To quote from a judgment of the Supreme Court of the United States: *Boom Co. v. Patterson*, 98 U. S. 403, at p. 408, "The enquiry must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated."

Has not the owner of such a property a right to make the best bargain he can with these people, and if they are willing to give, say, \$1,600, whilst he demands \$2,000, can they by resorting to arbitration deprive him of compensation altogether?

I quite recognize the fact that in compensation cases the ordinary principles of law as to remoteness of damages apply, but this does not come within the rule. The damages are not remote, nor speculative as that term is generally applied and understood.

Judgment.

BURTON
J.A.

This property has necessarily a value from its situation. It was certain that whenever Wright consented to open his end of the street, the residents upon it would use their best efforts to secure the street being carried entirely through the block from one avenue to the other. It might be delayed, but the value was all the time there.

I do not recognize the force of the argument that the value of the appellants' strip of land would be nil, so long as the land reserved by Wright was not secured. If that land could not be expropriated, the argument would be sound; but it can be and was expropriated. When the appellants were notified of the intention of the promoters to invoke the powers of the Municipal Act, for the purpose of opening this street throughout, they had a right to assume as the fact was that both pieces would be expropriated at one and the same time, and their right to compensation was complete. Were it otherwise, the existence of the two strips would be an effectual bar to a claim of compensation by either, and would amount to confiscation.

It does not lie in the mouths of these respondents to raise such an objection. They have taken, or assumed to take, both pieces for the purpose of completing the street, and that object cannot be effected without expropriating both parcels, and paying to each of the owners such compensation as they show themselves entitled to.

Lord Justice James makes use of a remark in one case which, as it seems to me, is very pertinent to this case, where he puts these words into the mouth of the person whose land was taken, "if you had left me alone I should have made so much profit."

Applying that remark to a case like the *Stebbing Case*, it is quite clear that the Rector lost nothing by not being left alone. Whether he was left alone or not, he had nothing from which he could make a profit; but that was not the case with Mr. Harvey—if the powers of the municipal corporation had not been invoked—if he had been left alone—he would have obtained from the persons desiring to make the improvement, the market value of this

piece of land, and justly so. This piece of land is suitable and necessary for the laying out of the street which the petitioners seeking the improvements desire. Why should they be entitled to get for nothing under the compulsory clauses, what they would gladly have paid a considerable sum for if those clauses had no existence ?

Judgment.

BURTON
J.A.

I think the arbitrators have proceeded upon a wrong principle in holding the appellants not entitled to any compensation, and that the award should be set aside and the appeal allowed with costs.

I may add that the case supposed by the learned Chief Justice, so far from militating against the opinion I have expressed, tends in my view to support it.

Whether the buildings in the case suggested were offensive or merely interfered with the view from the neighbouring houses, (for the principle must be the same in either case), the existing state of things would give a special value to the property ; other property in the immediate neighbourhood might be selling at a much lower price than the proprietor of these premises might be willing to take for them. He might well say, in the near future I shall obtain from the owners of those houses the price I demand, and I will not take a penny less.

Can it be contended with any reason that that would not be an element in the valuation if they should be taken compulsorily for some public purpose ? I apprehend that the market value, to whatever cause attributable, would be the measure of the compensation to which he would be entitled. To any persons other than the owners of the houses, the property would not be worth the sum asked ; but that is the owner's good fortune. The property is worth that to him for the simple reason that the owners of the houses must have it. Why should the public get it for less than they are willing or would have to pay to acquire it ?

Appeal dismissed without costs, BURTON, J. A., dissenting.

FINCH V. GILRAY.

Landlord and tenant—Payment of taxes by tenant—Rent—Tenant acquiring title by possession—Real Property Limitation Act—R. S. O. ch. 111, sec. 5, sub-sec. 6—Acknowledgment of barred debt.

A tenant agreed to pay for certain premises six dollars a month and taxes, and for some eighteen years remained in possession paying the taxes to the municipality and paying nothing else.

The tenant after the expiration of this period gave to his landlord an acknowledgment of indebtedness for rent for the whole period :—

Held, that the payment of taxes was not a payment of rent within the meaning of the Real Property Limitation Act, and that the tenant, although he had always intended to hold merely as tenant, had acquired title by possession, and could not make himself liable as for rent accruing after he had so acquired possession by giving to the landlord an acknowledgment of indebtedness in respect of rent.

Davis v. McKinnon, 31 U. C. R. 564, observed upon.

Judgment of the Queen's Bench Division reversed, and that of STREET, J., at the trial restored.

Statement.

THIS was an appeal from the judgment of the Queen's Bench Division, reported 16 O. R. 393.

The plaintiff was the executrix of one Richard Finch, and the defendant was an execution creditor of one John Finch, son of the plaintiff and Richard Finch. Certain freehold property of John Finch had been sold under the execution of the defendant, and the plaintiff, as executrix of Richard Finch, made a claim under the Creditors' Relief Act to be allowed to share in the proceeds of the sale in respect of rent alleged to be due by John Finch to the estate of his father Richard Finch for the same property. The defendant contested the claim, and the matter was summarily disposed of by the County Court Judge. On appeal, however, to this Court, an issue was directed to be tried in the Queen's Bench Division, the claimant being made plaintiff and the contestant defendant, and this issue was tried before STREET, J., at Toronto, on the 13th of January, 1888.

It appeared that in the year 1867, Richard Finch, being then the owner of certain property on University Street, placed his son John Finch in possession of it, he agreeing to pay \$6 a month and taxes; and, as the claimant alleged, with the understanding that the rent was to be increased as rents in the neighbourhood

rose. For a few months John Finch made his pay-Statement. ments, but about the beginning of 1868 he had some business troubles, and after this he remained in possession until after the death of his father in 1886, paying nothing except the taxes, and these he paid from year to year to the municipality. From time to time the claimant, who looked after her husband's business and managed his property, went to the premises in question, and on behalf of her husband, requested John Finch to make payments on account of the rent. He always promised to pay but was never pressed for payment, and never made any payments. John Finch was assessed as tenant, and Richard Finch as owner, and it was proved that all parties treated John as tenant, and that he himself never contended that he was anything else. Richard Finch by his will left the property in question and other properties to trustees upon certain trusts for his wife during life, with the proviso that it should not be incumbent upon the trustees to exact or collect any rent from his son John Finch during the life of the testator's wife, and after her death he left the property in question to his son John Finch.

After the sale under the execution, John Finch gave to the claimant an acknowledgment of indebtedness in the sum of \$2,244.00, in respect of rent due on account of the property in question, the rent being calculated at \$6 a month for some years, and afterwards at various increased rates.

STREET, J., held that payment of taxes was not equivalent to payment of rent so as to keep the Statute of Limitations from running, and that after the expiration of the statutory period John Finch became the absolute owner of the property, and could not make himself liable for any rent accruing due after that date, but he gave judgment for the claimant for \$786, as rent from Christmas, 1867, to November, 1878, calculated at \$6 per month. The Divisional Court, however, considered that the payment of taxes kept the right of the original owner alive, and directed judgment to be entered in favour of the claimant for \$1,290, being rent for the whole period at \$6 per month.

Argument.

The defendant appealed, and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 21st and 22nd of May, 1889.

J. B. Clarke, for the appellant. The mere payment of taxes is not equivalent to the payment of rent, as the tenant may pay them not as rent but merely because he is liable to pay them to the municipality. As between the tenant and the landlord, the landlord is primarily liable for the taxes where no agreement is made as to their payment, but as far as the municipality is concerned the tenant is responsible as well as the landlord, and there is nothing to show that the payments made here were not made merely to discharge that responsibility. Payment of taxes would be a mere performance of a covenant by the tenant and not a payment in the nature of rent. The case of *Davis v. McKinnon*, 31 U. C. R. 564, is distinguishable. In that case the question was whether any tenancy had been created at all, and not whether the tenancy had been kept alive. Payment of taxes is no proof of possession, and in analogy to that, mere payment of taxes cannot be looked upon as payment of rent: *Macdonell v. Rattray*, 7 U. C. R. 321; *In re Jarvis v. Cook*, 29 Gr. 303. The mere demands for payment of rent did not keep the landlord's right alive. There must be something that puts an end to the tenancy and creates a new tenancy, or something done as a step in regaining possession: *Day v. Day*, L. R. 3 P. C. 751; *Ryan v. Ryan*, 4 A. R. 563; *Keffer v. Keffer*, 27 C. P. 257. As soon as the statutory period expired the person in possession acquired an absolute title, whether he desired to acquire it or not, and an acknowledgment of indebtedness could not be of any avail as regards the period of occupation after the expiration of the statutory period.

W. M. Douglas, for the respondent. If the debtor does not set up the statute other creditors cannot complain, and the acknowledgment in itself is good: *Adams v. Woodlands*, 3 A. R. 213. Payment of taxes is payment of rent, and

keeps the relation of landlord and tenant alive. Here the taxes are actually part of the rent, and the cases where there is a mere covenant to pay taxes as taxes are distinguishable. *Davis v. McKinnon*, 31 U. C. R. 564, is undistinguishable in principle. There the taxes were payable in respect of another lot, and here they were payable as another part of the same rent. The principle of *Workman v. Robb*, 7 A. R. 389, also applies. There something was done that was considered equivalent to rent. The payment of taxes relieves the landlord, and is a return for the use of the land, and that makes it equivalent to rent: *Waller v. Andrews*, 3 M. & W. 312; *Bramston v. Robins*, 4 Bing. 11; Woodfall's Law of Landlord and Tenant, 12th ed., 371. The entry of the claimant acting for the owner and the demand for rent and the promise to pay kept the statute from running: *Workman v. Robb*, 7 A. R. at p. 397. Argument.

J. B. Clarke, in reply. In *Workman v. Robb*, the improvements were actually accepted as rent. The tenancy in this case was from year to year, and mere entry and demand for payment could not terminate it.

October 12th, 1889. BURTON J. A. :—

It is not perhaps very material to consider whether the tenancy in this case was a monthly or a yearly one, as in neither view was there any determination of that tenancy by the act of the parties. If the stipulation that the tenant was to pay the taxes can be treated as a reservation of rent, the payment of the taxes during the continuance of the tenancy would prevent the running of the statute, and entitle the plaintiff to retain her judgment for the full amount found in her favour by the Divisional Court.

But I am unable to bring myself to that conclusion, nor can I find any authority to support such a contention beyond a remark of Mr. Justice Morrison, in the case of *Davis v. McKinnon*, 31 U. C. R., at p. 567, which may have been perhaps correct enough, as applied to the question

Judgment.

BURTON
J.A.

then under consideration, but is not in my judgment any authority for the position that a payment of taxes to the municipal authorities, even though made in pursuance of a contract to that effect with the landlord, can be treated as a payment of rent within the meaning of the Real Property Limitation Act, so as to save the operation of the statute.

In the case first suggested by the learned Judge, the payment of a sum equivalent to the taxes would have been a reservation of rent directly to the landlord; in the other it cannot be considered as a reservation of rent, but a collateral covenant to do something in addition to the payment of his rent, which has the effect, no doubt, of inducing the landlord to accept a lower rent, but it is not rent, and so a payment of it cannot be relied on as falling within the section of the Act.

This view is fully borne out in an American case: *Garner v. Hannah*, 6 Duer (N.Y.) 262, where the learned Judge says:—

“Rent has a fixed legal meaning, and to consider all payments which, by the terms of a lease, a tenant is bound to make as coming within its definition, would lead to a confusion of ideas without necessity or advantage.”

And the same Court deals with the question of collateral covenants in the same way as I have done.

“In one sense” the judgment proceeds “the performance of every covenant on the part of the lessee is a return made by the tenant for the use of the land. Yet it would hardly be contended that money stipulated to be expended in repairs, or for insurance, or in the way of improvements, was any portion of the rent. Taxes, being payable annually, approach, it is true, to the idea and character of rent, which is a certain yearly return reserved to the landlord in money, or kind, or service, for the enjoyment of the freehold; but they are distinguishable from rent in this, that they are uncertain both as to amount and time of payment, and are payable not to the landlord but to the government.”

The cases which are to be found in England of services

rendered in lieu of rent, such, for instance, as "tolling a bell," or "sweeping a church," stand upon an altogether different footing. In all those cases services are substituted for money, but a distress can be made for them, and they have been held, therefore, to be equivalent to the payment of rent. The interpretation clause of the English Act is apparently wider than ours, and includes all services and suits for which a distress may be made.

Judgment.

BURTON
J.A.

If the tenancy was one from year to year, the statute would have commenced to run against Richard Finch some time in 1878, the precise period being difficult to arrive at, as the evidence fails to show in what month in 1867 John Finch entered under that tenancy. If, on the other hand, it was a monthly tenancy, the 24th of December, 1867, would be the starting point as the period when the last payment of rent was received.

I see no sufficient reason for not accepting Mr. Justice Street's conclusion that the ten years expired at all events in November, 1878, at which time Richard Finch's title was extinguished. He was therefore not entitled to recover any rent for occupation subsequent to that date, and an acknowledgment to the executrix being wholly without consideration cannot be set up as against the creditors any more than an acknowledgment of title to the land, if it had not been sold under execution, could be set up. Any thing short of a re-conveyance would be valueless.

The arrears of rent prior to the determination of the father's title stand upon a different footing.

It was held, shortly after the passing of the Real Property Act in England, that the word "rents," in the 2nd section of that Act, which is in the same terms as our own, could not be taken as having any reference to rents such as those now in question, viz., rents reserved by contract as the conventional equivalent for the right of occupation, but must be confined to rents existing as an inheritance distinct from the land, and for which, before the statute, the party entitled might have had an assize, such as ancient rent service, fee-farm rents or the like.

Judgment.

BURTON
J.A.

It might at the first blush appear that the language of section 15, which declares that "at the determination of the period limited by this Act to any person for making an entry or distress, or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress, or action respectively might have been made or brought within such period, shall be extinguished," would apply to the arrears due before the father's title ceased; but these words clearly have reference, as sections 2 and 3 have reference, to an estate in rent and an estate in land, the title to which, after the period of ten years limited for bringing an action, is extinguished. The landlord, in such a case as this, has no estate in the rent; he has an estate in the land which is absolutely extinguished if he has received no rent for the prescribed period. There is no time limited for bringing an action for arrears of rent, so long as the relation of landlord and tenant exists, although the plaintiff is restricted in his recovery to six years: *Archbold v. Scully*, 9 H. L. C. 360. See also *Grant v. Ellis* 9 M. & W. 113. The remedy only therefore being barred, the son had a perfect right to make the acknowledgment in question as to such arrears.

I quite agree with the learned Judge that the visits of Mrs. Finch from time to time demanding rent did not stop the running of the statute.

I am of opinion, therefore, that the judgment should be reversed, and that of Mr. Justice Street restored.

OSLER J. A.:—

The defendant's appeal from the judgment of the Queen's Bench Division is confined to two points. He contends (1) that Richard Finch's title to the land was extinguished by virtue of the Statute of Limitations in favour of his tenant John Finch, the judgment debtor, in the month of December, 1878; and (2) that John having then acquired title, the acknowledgment subsequently given by him to the plaintiff, who is the widow and execu-

trix of Richard, cannot, as against John's creditors, set up a debt for rent accruing due after that period.

Judgment.

OSLER

J.A.

If the first point is established it follows, in my opinion, as a matter of course, that the second must also be decided in favour of the appellant.

So far as the judgment of the Queen's Bench Division affirms the plaintiff's right to prove under the Creditors' Relief Act, in respect of the rent admitted to be due up to December, 1878, it is not complained of.

Whether John Finch acquired a title under the statute depends upon the effect to be attributed to the payment of the taxes on the land, in addition to the rent, pursuant to his agreement with the owner. The plaintiff, who acted as agent for her husband in letting the property, said that "the rent was six dollars a month and the taxes." The most favourable construction the evidence admits of is, that these taxes were to be paid, not to the landlord, but in the ordinary way to the municipal collector in discharge of the landlord's liability. If such payment from time to time can be regarded as payment of part of the rent, or equivalent thereto, then the statute never ran in John's favour. He never ceased to be tenant, and the plaintiff would be entitled upon his acknowledgment to receive rent for the whole period of his occupation the right to such rent not being barred but the remedy merely. Sugden's Real Property Statutes, 2nd ed., pp. 45, 46; Leith's Blackstone, 2nd ed., pp. 429, 446.

What the statute enacts is, that where any person is in possession of land as tenant from year to year or other period without any lease in writing, the right of the person entitled subject thereto to make an entry or distress, or to bring an action to recover such land, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy was received, whichever last happened: R. S. O. ch. 111, sec. 5, sub-sec. 6.

It appears to me, with great deference, that the word

Judgment.

OSLER
J.A.

rent here used means that which the law knows as such, viz., a rent reserved or rent service, and that the payment of taxes cannot be regarded as a receipt of rent by the person entitled within the meaning of the Act. Rent is a thing which has a known legal signification, and which possesses qualities incapable of being attributed to the payment of the yearly taxes here, though such payment is by the agreement of the parties to be regarded as the compensation for the use of the land. Conceding, for argument's sake, a likeness to rent in its being an annual payment, capable of being reduced to certainty, and payable on account of the enjoyment of the land, as is said in *Davis v McKinnon*, 31 U.C.R. 564, it nevertheless differs from it in more than one important particular.

"Rent is defined to be a certain profit issuing yearly out of lands and tenements corporeal, and may be regarded as of a two-fold nature: first, as something issuing out of the land as a compensation for the possession during the term; and secondly, as an *acknowledgment* made by the tenant to the lord of his fealty or tenure." Woodfall, 11th ed., p. 338.

"Littleton's test is to be laid down as a sure rule that no rent (which is properly said a rent) may be reserved upon any feoffment, gift, or lease, but only to the feoffor, donor, *lessor*, or to their heirs, and in no manner may it be reserved to any *stranger*." Bac. Abr. Rent, (G).

"A rent service being something in retribution for the land that passes, it must be reserved by such words as imply a *return* of something that was not in the grantor before, *reddendo*," &c. Bac. Abr. Rent, (D.)

"A reservation is a clause in a deed, whereby the grantor or lessor, in respect of the grant or lease, reserves to himself, or in some cases to the lord of the fee, and not to a stranger, some money, chattel, or service." Smith on Real and Personal Property, 6th ed. p. 745, sec. 1788.

Distress is incident of common right to every rent service, but, "if a rent could be reserved to a stranger, the con-

sequence would be, that the grantee might distrain another man's goods for payment of the debt of the grantor; but no person can lawfully grant a power to take another's goods": *Gilbertson v. Richards*, 4 H. & N. 284-5, 295.

Judgment.

OSLER
J.A.

Again, a rent service is an incorporeal hereditament; it lies in grant; the assignee may sue for it in his own name, and it descends to or devolves upon the person entitled to the reversion of the land out of which it issues. Smith on Real and Personal Property, 6th ed., p. 23 sec. 54.

Taxes, then, paid as such by the tenant under an agreement with the landlord, cannot be regarded as rent, because (1) they are not reserved to the lessor himself, and are, indeed, not a reservation at all, not being a return of some profit to the lessor, but a mere charge, by the payment of which to a third person, pursuant to agreement, he is to be freed from liability; (2) the lessor has no power to distrain in case of their non-payment; (3) he cannot grant or assign them. Denuded of these qualities, they have none of the substantial characteristics of a rent. The mere expenditure by the tenant of a specified annual sum for repairs or insurance as a consideration for his occupation, could not, except by way of a discharge for a rent in form reserved, of itself be regarded as a rent, and the payment of the taxes, it may be by means of a collector's distress warrant, cannot be placed on even so high a footing, for as the tenant is himself liable for them by virtue of his occupation, their discharge does not necessarily import that acknowledgment of his tenancy which the statute aims at, and which is implied in the very expression, payment of *rent*.

For these reasons, I respectfully dissent from the views expressed on this point by Mr. Justice Morrison, speaking for the Court, in *Davis v. McKinnon*, 31 U. C. R. 564, although I agree with him that an agreement to pay the landlord every year for the rent an amount equal to the taxes, which might be discharged by paying the taxes, would be a good reservation. This, however, makes all the

Judgment. difference; nor, as I have shewn, is the distinction unimportant or merely technical.

OSLER
J.A.

✓ I have found two cases in the American Courts in which the point has been raised. One is *Garner v. Hannah*, 6 Duer (N. Y.) 262, where it received a full discussion, and was decided in accordance with the views I have expressed. The other is *Fernwood Masonic Hall Association v. Jones*, 102 Pa. St. 307, where it was held that where in a lease the lessee covenants to pay the lessor for all gas consumed on the premises a sum due for gas consumed is to be regarded as rent in arrear, and may be distrained for. The Court say: "That the lessee agreed to pay for the gas at a certain rate is as plain as that he agreed to pay \$1,500 (the expressed rent) per annum. Both stipulations are in immediate connection, and the covenant to pay for the gas is as much a part of the rent as would be a covenant to pay the taxes during the term."

This is directly opposed to the New York case, and in the absence of any reasons for the decision, it cannot be regarded as a satisfactory one.

On the whole, it appears to me that the appeal should be allowed, and that the judgment of Mr. Justice Street at the trial was right and should be restored.

MACLENNAN J. A. :—

I also am of opinion that the appeal should be allowed, and that the judgment of Mr. Justice Street should be restored.

- It was not disputed on the argument that the plaintiff was entitled as executrix of her late husband to the rent which accrued in respect of her son John's tenancy prior and up to the month of December, 1878, and the appeal was confined to so much as was allowed by the judgment of the Divisional Court in respect of rent which accrued subsequent to that date.

I am unable, with great respect, to agree with the judgment appealed from, that the payment by a tenant of the

taxes, where it is the agreement that he is to pay the taxes as well as a certain sum for rent, can be regarded as a receipt of rent by the person entitled subject to the tenancy, within the meaning of the Statute of Limitations, R. S. O. c. 111, sec. 5, sub-sec. 6. Judgment.
MACLENNAN
J.A.

That sub-section enacts that "the right of the person entitled shall be deemed to have first accrued * * at the last time when any rent payable in respect of such tenancy was received."

It cannot fairly be said that, by the express terms of the agreement, the taxes were to be paid as so much additional rent. The parties, no doubt, could have agreed to that, but I think it is not proved that they did so in this case, and the question is whether in every case when a tenant agrees with his landlord to pay the taxes, they are in law a part of the rent, and subject to all its legal incidents.

I think that even if it could be held that the taxes might be regarded as rent, the payment of them to the municipality would not take this case out of the statute, because what the statute requires is, that it shall be received by the person entitled subject to the tenancy. In *Harlock v. Ashberry*, 19 Ch. D. at p. 545, Jessel, M. R., says: "The underlying principle of all the Statutes of Limitation is, that a payment to take the case out of the statute must be a payment by a person liable, as an acknowledgment of right," and he quotes Lord Westbury to the same effect, in *Chinnery v. Evans*, 11 H. L. C. 129. Further on he says: "That is the theory of all the Statutes of Limitation; the idea is not intelligible except upon the notion of the payment being an admission of right." And in that case it was held that the payment of rent by a tenant to a mortgagee, under a notice by the latter requiring him to do so, was not a payment of principal or interest within the statute. It was argued that as the rent was the mortgagor's money, intercepted by the mortgagee, which the latter was bound to bring into the mortgage account, it must necessarily be a payment, as between mortgagor and mortgagee, on account of either

Judgment.
MACLENNAN
J.A.

principal or interest, but the argument did not prevail, because compulsory payment by the tenant could not be regarded as an acknowledgment by the landlord. Now, in the present case, I am unable to see how the landlord can be said to have received rent as required by the statute. He received nothing—rent or anything else. It was not intended that he should receive the taxes. What he was to receive was the six dollars a month; the taxes were to go to the municipality. A payment of rent to him would have been an unequivocal acknowledgment of title made to the proper person, but how could payment of the taxes to the municipality be an acknowledgment? In *Harlock v. Ashberry* already referred to, it was held for the same reason that the word “paid” in the statute involved by implication the addition of the words, “by the person liable to pay,” and so here the word “received” involves the addition of the words “by the person entitled subject thereto.”

But I think the same conclusion must be come to from a consideration of the Assessment Act, and the position in which tenants are placed by that Act with respect to the taxes of lands occupied by them.

By section 17 of the Assessment Act, R. S. O., ch. 193, it is enacted that land is to be assessed against both the owner and the occupant, if the occupant is any other person than the owner. By section 119 and following sections, provision is made for the collection of the taxes from the persons assessed, if necessary, by distress and sale of their goods or of any goods in their possession, anywhere within the municipality; and by section 24 it is enacted that any occupant may deduct from his rent any taxes paid by him, if the same could also have been recovered from the owner, unless there is a special agreement between the occupant and the owner to the contrary.

The effect of the statute is, that both the landlord and the tenant are liable by law to pay the taxes to the municipality. The tenant cannot escape liability if he would. If he paid them to the landlord, that would not excuse him or discharge him. He would have to pay them again unless the landlord paid them. If compelled to pay them

he might deduct them from his rent unless there were an agreement to the contrary.. The effect of the agreement is, that having paid the taxes he cannot deduct them from his rent. But for the agreement, he could deduct them, and in that case it might perhaps be regarded as a payment of rent *pro tanto*, though even then it could not be regarded as rent received by the landlord. When a tenant agrees with his landlord to pay the taxes, he agrees to do what he cannot choose but do, what the law obliges him to do; and the only effect which can be given to such an agreement is, that he may not deduct what he pays from his rent. In my judgment the tenant in this case must be regarded as having paid his taxes in discharge of his legal obligation to the municipality, and I think it is impossible for any purpose to regard it as rent received by the landlord, or as an acknowledgment of title.

Judgment.

MACLENNAN
J. A.

If the principle on which the judgment rests is sound, then it would follow that most if not all of the covenants contained in a lease, on the part of a tenant, could be enforced by distress, as being part of the consideration agreed to be given by the tenant for the enjoyment of the land; and if this were so, I think we should not at this day be without distinct authority in the books for such a doctrine. So far from there being any distinct authority in that direction, there seems to be none, and it is very significant that the Imperial Statute, 42 Geo. III. ch. 116, the Act for the redemption of the land tax, by section 126 provides in effect that wherever a tenant has become bound by agreement with his landlord to pay the land tax, and the landlord shall have paid it, it is to be considered as rent reserved, and may be recovered by distress.

If the law were that a mere agreement by a tenant to pay taxes made them part of his rent, as held in the Court below, this enactment would have been unnecessary.

For these reasons I am respectfully of opinion that the appeal should be allowed.

HAGARTY C. J. O. concurred.

Appeal allowed with costs.

MCINTYRE V. HOCKIN.

Master and servant—Wrongful dismissal—Condonation—Province of Jury.

In an action of damages for wrongful dismissal tried with a jury, it is for the Judge to say whether the alleged facts are sufficient in law to warrant a dismissal, and for the jury to say whether the alleged facts are proved to their satisfaction.

If good cause for dismissal exists it is immaterial that at the time of dismissal the master did not act or rely upon it, or did not know of it, and acted upon some other cause in itself insufficient.

When the master has full knowledge of the nature and extent of misconduct on the part of his servant sufficient to justify dismissal, he cannot retain him in his employment, and afterwards at any distance of time, turn him away for that fault, without anything new; but this condonation is subject to the implied condition of future good conduct, and whenever any new misconduct occurs the old offence may be invoked and may be put in the scale against the offender as cause for dismissal. Condonation is a question of fact for the jury if in the opinion of the Judge there is any evidence of it to be laid before them.

Judgment of the County Court of Elgin affirmed.

Statement.

THIS was an appeal from the County Court of Elgin.

The action was one for wrongful dismissal. The plaintiff was employed as a clerk by the defendants, who were country store-keepers, the engagement being in writing and being for one year from the 4th of April, 1887. The plaintiff agreed to serve the defendants as a skilful and diligent clerk ought to do, and to give and devote to their interests his whole time and labour, except on lawful holidays. He was to be paid \$550.00 for the year's service in equal one-twelfth payments on the 7th day of each month. The defendants dismissed him on the 7th of December, having paid his salary up to that time, the reason assigned for dismissal being that he had been in the habit of absenting himself to play croquet. At the time of dismissal the defendants offered the plaintiff other employment at lower wages.

The grounds of dismissal set up in their defence and particulars were, that on two occasions, without the defendants' knowledge or consent, he absented himself from his duties to visit fairs at Rodney and London; that he absented himself two days to attend a foot race at St. Thomas; that he spent a great deal of time during business hours in the

months of June, July, August, and September, in playing croquet, and that on one occasion he was absent running a foot race, and hurt his foot so as to be incapable of attending to business for six weeks. Statement.

The case was tried before the Judge of the County Court of Elgin with a jury, and after a great deal of evidence had been taken, the case was submitted to the jury, the Judge leaving it to them to say whether there was good cause for the dismissal, and whether there had been condonation. Upon the answers returned by the jury judgment was subsequently delivered in favour of the plaintiff, the Judge, however, stating that in his opinion he had not acted properly in leaving the matter as he did to the jury, and intimating that he would be willing to grant a new trial if applied for by the defendants; and upon a subsequent motion by the defendants a new trial was ordered.

The plaintiff appealed, and the appeal came on to be heard before this Court (BURTON, OSLER, and MACLENNAN JJ.A.) on the 5th and 6th of September, 1889.

Moss, Q. C., for the appellant. There was no misdirection in the charge. The case was fairly left to the jury, and the question of good cause for dismissal was for them to decide, and the Judge should not have interfered merely because he did not approve of the verdict. He cannot assume jurisdiction by expressing dissatisfaction with his own charge: *Logg v. Ellwood*, 14 A. R. 496; *Commissioner for Railways v. Brown*, 13 App. Cas. 133. The defendants may have had good reasons for dismissing the plaintiff, but did not at the time of dismissal, though knowing of these reasons, set them up and rely upon them. On the contrary they condoned the offences by asking the defendant to accept other employment, and could not, when that offer was refused, go back to the old causes and rely upon them as justifying the dismissal. Here the misconduct complained of was of such a nature that there could be no fear of future repetition, and where there is no like-

Argument. likelihood of future repetition, actual damage must be shown to justify dismissal: *Smith's Law of Master and Servant*, 4th ed., pp. 139 to 154.

J. M. Glenn, for the respondents. The cause assigned for dismissal was sufficient, but at any rate there were other grounds amply justifying the dismissal, and although these were not known at the time, still the defendants were entitled to rely upon these grounds when they came to their knowledge. By offering the new employment, there was no intention to condone, and that intention must be shown: *Wood's Law of Master and Servant*, 2nd ed., p. 239. The question of the validity of the grounds for dismissal should be decided by the Court and not left to the jury: *Macdonell's Law of Master and Servant*, p. 217. This Court should not interfere where a new trial has been ordered: *Campbell v. Prince*, 5 A. R. 330; *Hunter v. Van Stone*, 7 A. R. 750.

Moss, in reply.

October 12th, 1889. The judgment of the Court was delivered by

MACLENNAN J. A.:—

I am clearly of opinion that the learned Judge was right in directing a new trial, and that the appeal must be dismissed.

Notwithstanding some earlier cases to the contrary, I think it is now settled that it is for the Judge to say whether the facts are sufficient in law to warrant a dismissal, and for the jury to say whether the alleged facts are proved to their satisfaction. The Judge should, as a matter of law, direct them whether the facts proved are sufficient cause: *Macdonell's Law of Master and Servant*, p. 217, and cases there cited. In the present case, the learned Judge virtually left the question both of fact and law to the jury when he asked them to find whether there existed a cause for dismissal at the time it was done. I

think what was proved, if believed by the jury, was ample cause in law to warrant the dismissal. It is now settled law that if a good cause of dismissal really existed, it is immaterial that at the time of dismissal the master did not act or rely upon it, or even did not know of its existence, or that he acted upon some other cause in itself insufficient. The main question always is, were there at the time of dismissal facts sufficient in law to warrant it, and, as I have said, while it is for the jury to say whether the alleged fact or facts are proved to their satisfaction, it is the province of the Judge, as a matter of law, to direct them whether the facts are sufficient.

Judgment.
MACLENNAN
J.A.

The causes which are sufficient to justify dismissal must vary with the nature of the employment and the circumstances of each case. Dismissal is an extreme measure, and not to be resorted to for trifling causes. The fault must be something which a reasonable man could not be expected to overlook, regard being had to the nature and circumstances of the employment, and it cannot be said that an occasional absence from his business, even for the purpose of amusement, is so serious a matter in the case of a store in a small country village, as it would be in the case of a shop in a large city with a great trade and numerous customers. So, also, while it is not necessary that any actual pecuniary loss or damage should be shewn, yet the absence of such damage or the contrary is not immaterial to be considered.

The learned Judge in his judgment refers to and relies upon the case of *Pearce v. Foster*, 17 Q. B. D. 536; but there is a still later case, also a judgment of the Court of Appeal in England, *Boston Deep Sea Fishing Co. v. Ansell*, 39 Ch. D. 339, in which the subject is very fully discussed, and which makes it unnecessary to say more upon the question of sufficient cause.

It may be proper, however, to add a few words on the subject of condonation. When an employer becomes aware of misconduct on the part of his servant, sufficient to justify dismissal, he may adopt either of two courses.

Judgment.
MACLENNAN
J. A.

He may dismiss, or he may overlook the fault. But he cannot retain the servant in his employment, and afterwards at any distance of time turn him away. It would be most unjust if he could do that, for one of the consequences of dismissal for good cause is, that the servant can recover nothing for his services beyond the last pay day, whether his engagement be by the year or otherwise: Smith's Law of Master and Servant, 4th ed., p. 220; *Boston Deep Sea Fishing Co. v. Ansell*, 39 Ch. D. 339. If he retains the servant in his employment for any considerable time after discovering his fault, that is condonation, and he cannot afterwards dismiss for that fault without anything new. No doubt the employer ought to have a reasonable time to determine what to do, to consider whether he will dismiss or not, or to look for another servant. So, also, he must have full knowledge of the nature and extent of the fault, for he cannot forgive or condone matters of which he is not fully informed. Further, condonation is subject to an implied condition of future good conduct, and whenever any new misconduct occurs, the old offences may be invoked and may be put in the scale against the offender as cause for dismissal.

It does not seem to be necessary to say anything further than that condonation is a question of fact for the jury, if in the opinion of the Judge there is any evidence of it to be laid before them, and we cannot say there was a total absence of such evidence here.

Appeal dismissed with costs.

ROBB V. MURRAY.

County Court—Jurisdiction—Claim over \$200—Liquidated or ascertained amount—R. S. O. ch. 47, sec. 19, sub-sec. 2.

Pending negotiations for the sale by the plaintiff to the defendant of a certain business as a going concern the defendant entered into possession, made sales, and received moneys, entering the receipts in a cash book. The negotiations fell through and the plaintiff brought this action in the County Court to recover “\$271.03 the return of moneys received by the defendant belonging to the plaintiff, being proceeds from sales of goods in plaintiff’s shop, as follows :” setting forth the sums received on each day by the defendant :—

Held, that this sum was not ascertained by its receipt by the defendant and the bringing of the action by the plaintiff for the sum so received. The increased jurisdiction applies only in the comparatively plain and simple cases where by the act of the parties or the signature of the defendant the amount is liquidated or ascertained *as being due* from one party to the other on account of some debt, covenant, or contract between them ; such ascertainment of the amount by the act of the parties being something equivalent to the stating of an account between them.

Judgment of the County Court of Middlesex affirmed.

THIS was an appeal from the judgment of the County Court of Middlesex, by which the action was dismissed on the ground that the case was beyond the jurisdiction of the Court. Statement.

The plaintiff was the owner of a shop and business in London, which the defendant and one Rhycard were desirous of purchasing. After some discussion about terms the parties proceeded to take stock, and the defendant and Rhycard were permitted to make sales, and to retain the proceeds, out of that portion of the stock which had been taken, apparently just as they would have done if the sale had been completed. They continued to act in this way from the 18th of December till the 28th of December, entering their daily receipts in their own cash book. In the end the parties were unable to come to terms, the plaintiff insisting upon security which the defendant contended he was not bound to give ; asserting also that the bargain had been completed ; that he was ready to do all that he had agreed to do and had been placed in possession. The plaintiff caused him to be ejected by a policeman, and brought this action to recover the moneys which had been received

Statement. from the sales of the stock. The writ of summons issued in the action was specially endorsed as follows :

"The plaintiff's claim is for \$271.03, the return of moneys received by the defendant belonging to the plaintiff. The following are the particulars :

Money received by defendant being proceeds from sales of goods in plaintiff's shop, as follows : "

And then were given the amounts received on each day during which the defendant had been in possession. The defendant denied all liability, insisting that he had received the money to his own use, and counter-claimed for damages for assault. Judgment was entered at the trial in favour of the plaintiff for \$246 and costs, but subsequently on motion this judgment was set aside on the ground above stated, that the claim was not within the jurisdiction of the Court.

The plaintiff appealed, and the appeal came on to be heard before this Court (BURTON, OSLER, and MACLENNAN, JJ.A.) on the 9th of September, 1889.

Magee, for the appellant. This is an action of debt for money had and received, and the amount must be considered as ascertained by signature by its receipt being entered in the cash book. At any rate the amount is ascertained by the act of the parties, the defendant having received it and the plaintiff consenting to that receipt by bringing the action. The claim too is a liquidated one as far as the amount is concerned, and all that is necessary is that the amount should be liquidated. The mere fact that the claim, or the amount of the claim, is disputed, does not destroy its character as a liquidated or ascertained claim. Liquidated practically means turned into money. It is not necessary that the total amount should be agreed on. Each item was liquidated, and it was only necessary to ascertain how many such liquidated items the plaintiff was entitled to recover : *Watson v. Severn*, 6 A. R. 559 ; *McLaughlin v. Schaefer*, 13 A. R. 253.

R. M. Meredith, for the respondent. This was not an

action of debt at all. Debt is a technical term, and as Argument. used in the statute the old distinction between debt and assumpsit is being preserved. If the term debt were not used in its limited technical sense, then it would have been unnecessary to use the word contract. The amount is not ascertained by signature or by the act of the parties. To be ascertained by the act of the parties, there must be something in the nature of an agreement that binds both parties as to the amount. The mere entry of the amounts in the cash book would not be sufficient.

Magee, in reply. Money had and received is a debt even in the strict meaning of that word. At all events this is a claim that can be recovered by an action of assumpsit, and that is included in the section : *Greenizen v. Burns*, 13 A. R. 481.

October 12th, 1889. The judgment of the Court was delivered by

OSLER J. A. :—

I am of opinion, that the judgment should be affirmed. The claim being for a sum not exceeding \$400 is *prima facie* within the limits of the increased jurisdiction of the County Court, first conferred by 19 Vic. ch. 90, sec. 20, and now by R. S. O. ch. 47, sec. 19, sub-sec. 2, which enacts that the Court shall have jurisdiction "in all causes and actions relating to debt, covenant and contract to \$400, where the amount is liquidated or ascertained by the act of the parties or by the signature of the defendant." The question then is, whether, upon the facts proved in the case, the amount sued for can be said to be liquidated or ascertained by the act of the parties, within the meaning of the statute. Whether it be by the signature of the defendant or by the act of the parties, which means the act of both parties, the essential thing to give jurisdiction is that the amount shall be liquidated or ascertained. The plaintiff argues that the

Judgment.

OSLER
J. A.

receipt of the money by the defendant was an act which necessarily ascertained the amount, so far as the defendant is concerned, while the bringing of the action for the money so received was an act on his own part which had a corresponding effect since he thereby asserted that he claimed no more than the defendant had received.

This reasoning is, however, open to the objection that it would extend the jurisdiction of the County Court to \$400 wherever it could be shewn, by the admission of the defendant or otherwise, that he had received money to that amount, to which the plaintiff could only assert a claim "by the application of some legal principle or the effect of a state of facts to be proved and which the law applies, independent of the acts and agreements of the parties;" in short, to every case in which the plaintiff alleged that the defendant, by some act or acts on his part, and whether by the actual receipt of money or otherwise had become indebted to him in a specified sum of \$400 or under.

In my opinion a case of that kind, which is the case before us, is not within the scope of the section, the intention of which was to give the larger jurisdiction only in the comparatively plain and simple cases where, by the act of the parties or the signature of the defendant, the amount was liquidated or ascertained *as being due* from one party to the other on account of some debt, covenant or contract between them. The language implies such an admission, since otherwise the increased jurisdiction might as well have been given generally in actions of that class, as the amount to be recovered as well as the fact of liability usually depends upon proof of some act of the defendant. Where no debt is admitted, I do not see how it can be said that any amount is liquidated or ascertained by the act of the parties, and I agree with the observation of Patterson, J. A., in *Watson v. Severn*, 6 A. R. 559, at p 565, that the ascertainment of the amount by the act of the parties is merely another way of saying that there is an account stated between them. "An account stated

is a settlement of accounts, in which both parties or their agents agree upon the amount due from the one to the other:" *Bates v. Townley*, 2 Exch. 152. The decision in the case of *Furnivall v. Saunders*, 26 U. C. R. 119, accords with this view, though the facts are different from those we have to deal with. There the whole amount of the plaintiff's account was beyond the jurisdiction, and the question was whether the balance claimed, which was over \$200 and less than \$400, had been ascertained by the act of the parties. It is clearly shewn that such an act is one which involves the admission of or assent to some balance due, whether arrived at by deducting a payment on account, or a set-off which the parties have agreed shall be treated as such. In our case the plaintiff is compelled to prove everything, even to the actual receipt of each sum of money by the defendant. His contention is, that the liability of the defendant flows as a matter of law out of the facts proved. The latter admits nothing, asserting that whatever may be proved to have been received by him was his own. I think the mere receipt of it by him as his own was not an ascertainment of the amount by the act of the parties, and the cases of *Osborne v. Homberg*, 1 Ex. D. 48, and *Walesby v. Goulstone*, L. R. 1 C. P. 567, seem to shew that it must have been ascertained before action brought, and therefore the plaintiff cannot rely upon the bringing of this action as an act on his part having that effect. See, also, Pitt-Lewis on County Court Practice, pp. 188-189.

Judgment.

OSLER
J.A.

Appeal dismissed with costs.

IN THE MATTER OF THE LONDON SPEAKER PRINTING
COMPANY.

PEARCE'S CASE.

IN THE MATTER OF THE SPEIGHT MANUFACTURING
COMPANY.

BOULTBEE'S CASE.

Company—Subscription before incorporation—Allotment—Ontario Joint Stock Companies Letters Patent Act—R. S. O. c. 157, s. 2, a. s. 6—Contributory—Ontario Winding-Up Act—R. S. O. c. 183.

P. signed an instrument purporting to be a subscription for shares in a company "proposed to be incorporated" under the Ontario Joint Stock Companies Letters Patent Act, in which he agreed with the company and the signatories thereto, to take the number of shares set opposite to his name.

B. signed an instrument purporting to be an agreement to accept shares in a company not at the time incorporated.

P. and B. were not corporators named in the Letters Patent, and no shares were in fact ever allotted to them, but they were entered in the books as shareholders, and notices of meetings and demands for payment of calls were sent to them, and in winding up proceedings they were placed on the list of contributories :—

Held, that there being no company in existence when the instruments in question were signed, they did not constitute binding contracts to take shares so as, without more, to make P. and B. liable as contributories. The shareholders at the date of the issue of the Letters Patent are those persons only who are named therein and to whom stock is allotted thereby ; and it is these persons and others who may afterwards become shareholders who constitute the company.

In re The Queen City Refining Co., 10 O. R. 264, explained.

Orders of the County Court of Middlesex and of the County Court of York reversed.

Statement.

THESE were appeals by Pearce and Boulton from orders of the County Courts of Middlesex and York, dismissing applications by the appellants to have their names removed from lists of contributories.

On the 13th of October, 1887, Pearce signed a document, of which the following are the material portions :

SUBSCRIPTION LIST, SPEAKER PRINTING COMPANY.

Capital, \$90,000.

Shares, \$20.00 each.

The thirteenth day of October, A.D., 1887 :

We, whose hands and seals are hereunto set, do hereby severally subscribe for the number of shares of \$20 each, set opposite to our respective signatures hereto in the Capital Stock of the Company, whereof the

prospectus is hereto prefixed, proposed to be incorporated under the name of "Speaker Printing Company," or such other name as the Lieut.-Governor shall approve, by Letters Patent under the Ontario Joint Stock Companies Letters Patent Act, with an authorized capital of \$90,000, to be divided into 4,500 shares of \$20 each.

And we do hereby severally and respectively agree with the said Company, and agree with each other, and with each and any one or more of the others of us, to subscribe for and take the said respective numbers of said shares, and to pay on each of such shares twenty-five per cent. thereof on subscription hereof, or whenever required by the Directors or Provisional Directors of the Company; a further twenty-five per cent. within one month after the incorporation of the Company, and the residue thereof in such sum or sums as shall be and whenever by the Directors required.

Provided always, and it is hereby agreed, that this agreement shall become void if there shall not be at least 750 of said shares subscribed for hereby within three months from the date hereof.

More than 750 shares were subscribed for within three months.

The subscription of Pearce was obtained by one W. W. Butcher, who was actively engaged in promoting the company and in obtaining subscriptions.

On the 5th of December, 1887, Pearce wrote the following letter to Butcher:

LONDON, Ont., Dec. 5th, 1887.

W. W. BUTCHER, Esq., Toronto.

Dear Sir—After making some enquiries and from information that has come to my knowledge and also owing to the very stringent state of money matters I feel in duty bound to request you to cancel my name as one of your subscribers of stock in your newspaper enterprise.

You will please comply with this request and much oblige,

Yours truly,

JOHN S. PEARCE.

The letters patent incorporating the company were issued on the 30th of August, 1888, and were in the usual form, constituting the persons therein named, "and each and all such other person or persons as now is or are or shall at any time hereafter become a shareholder or shareholders in the said company, a body corporate and politic."

Pearce was not one of the petitioners for incorporation, and was not one of the incorporators named in the letters patent. He was entered in the stock-book of the company

Statement.

as a shareholder, and notices of meetings and of calls and demands for payment of calls, were sent to and received by him. He took no notice of these notices and demands and never attended any meetings or took any part in the proceedings of the company, but took no steps to have his subscription cancelled beyond writing the letter above set out and making oral requests to Butcher from time to time to cancel the subscription. There was no proof of any formal allotment of shares to him.

A petition under the Ontario Winding-up Act was presented in January, 1889, and a winding-up order was made on the 6th of February, 1889. Pearce was placed on the list of contributories by the liquidator, and on appeal the Judge of the County Court of Middlesex upheld the liquidator's action.

Boulton signed a document, of which the following are the material portions :

THE SPEIGHT MANUFACTURING COMPANY (Limited.)

Capital \$200,000 in 2,000 shares of \$100.00 each. We, the undersigned, hereby agree to accept the number of shares set opposite our respective signatures of \$100 each in the capital stock of The Speight Manufacturing Company (Limited), and further agree to pay \$5 per share on the same at the time of allotment, and not more than \$25 per share to be paid the first year of the organization of the Company.

The company was not at the time incorporated. Subsequently letters patent under the Ontario Joint Stock Companies Letters Patent Act were issued incorporating the company, but Boulton was not a petitioner for their issue, and was not named in them as one of the incorporators. He was, however, entered in the books as a shareholder, and notices of meetings and of calls were sent to him, but no formal allotment of shares to him was proved.

The company carried on business for over six years, Boulton not attending any meeting or taking any part in its proceedings, but never repudiating his subscription or seeking to be released. The company was ordered to be wound up under the Ontario Winding-up Act, and Boul-

bee was placed on the list of contributories by the liquidator, and on appeal the Judge of the County Court of York upheld the liquidator's action. Statement.

Pearce and Boulton appealed, and the appeals came on to be heard before this Court (BURTON, OSLER, and MACLENNAN, JJ.A.), on the 9th and 10th of September, 1889.

A. O. Jeffrey, for the appellant Pearce. There being no company in existence at the time this document was signed by Pearce, it does not constitute a contract: *Tilsonburg Agricultural Manufacturing Co. v. Goodrich*, 8 O.R. 565. If it can be looked upon as an application for shares, it was revoked by the letter: *In re Warren's Blacking Company*, L.R. 4 Ch. 178; *In re Universal Non-Tariff Fire Insurance Co.*, 4 Ch. D. 774. If the letter was not a revocation, at all events the application was never accepted by the company or an allotment of shares made.

H. J. Scott, Q. C., for the appellant Boulton. A man cannot become a shareholder unless there is something in the nature of an agreement, but at the time this document was signed by Boulton there was no company, and no agreement could be made. Mere subscription unaccompanied by any subsequent act by the company cannot constitute the subscriber a shareholder. *In re The Queen City Refining Co.*, 10 O. R. 264, proceeds upon a wrong view of sub-section 6 of section 2, R. S. O. ch. 157. That sub-section refers merely to original shareholders and shareholders by transfer. If mere subscription makes the subscriber a shareholder, then there might be holders of more shares than the whole number of shares in the capital stock of the company. Clearly there must be some acceptance or allotment: *In re Scottish Petroleum Co.* 23 Ch. D. 413.

MacMillan, and *W. D. Gregory*, for the respective liquidators.

Judgment. October 12th, 1889.

BURTON
J.A.

PEARCE'S CASE.

BURTON J. A. :—

The question in all such cases, briefly stated, must be, whether a binding contract to take the shares has been entered into between the company and the person unwilling to admit his liability.

In this case the liability of the appellant depends upon the meaning to be given to the words used in the Joint Stock Companies Act, defining a shareholder, which it is said shall mean every subscriber to or holder of stock in the company. How does he fall within this definition? He has neither subscribed for stock nor had any stock allotted to him. If the memorandum could be treated as a request to have a certain number of shares allotted to him, the request was withdrawn before any allotment was made; and he has never in point of fact since the company came into existence subscribed to any stock in it.

In the English Acts subscribers to the memorandum of agreement made in anticipation of the incorporation are specially made liable as members—the words of the Act being “Subscribers of the memorandum of association of any company under this Act, shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company, shall be entered as members on the register; and every such person whose name is entered on the register shall be deemed to be a member of the company.”

There is no obligation that I can see on the part of the company to give him these or any number of shares. The signing of the agreement might or might not have given to the other parties named in it a right of action against him for refusing afterwards to take shares: upon that I express no opinion.

We have had occasion in more than one case to point out that there can be no such thing as ratification of a

contract which could not have been made binding on the ratifying party at the time it was made. At that time the company had no existence. There must be two parties to a contract, and even if the contract had been made with a person professing to be a trustee for the proposed company, it would not have carried the case further as he could not be agent for a principal who had no existence.

Judgment.

BURTON
J.A.

If the appellant had once become a shareholder, then I agree with the learned Judge below, that his repudiation would not have availed him. Even if he had been induced by any misrepresentation to enter into the contract, it would have been necessary for him to have commenced proceedings to set it aside before the making of the winding-up order. But, in the absence of any provision similar to that to be found in the English Acts making the subscription irrevocable and binding as a subscription to the capital of the company as fully as if it was then in existence, I think the letter prevented the subscription having any validity as between the appellant and the company.

The learned Judge probably followed the decision of the Chancellor in *In re The Queen City Refining Co.*, 10 O. R. 264; but looking at that decision, I should be inclined to think that that learned Judge was under the impression that the subscription was subsequent to the issue of the patent; and I am the more confirmed in this view inasmuch as in a subsequent decision, *Re Zoological and Acclimatization Society*, 17 O. R. 331, he referred to the case of *European R. W. Co. v. McLeod*, 3 Pugs. 3, in which the subscription was made after the passing of the Act of Incorporation, as in accord with the former decision.

The description of a contributory under the Winding-up Act does not seem to contemplate that any one but a shareholder or member of the company shall be placed upon the list, although this would probably be held to include a person who had entered into a binding contract with the company to take shares.

Judgment. OSLER J. A. :—

OSLER
J. A.

If any liability is cast upon a person who, prior to the issue of the letters patent, has signed an agreement to subscribe for shares in a projected company, but who is not one of the corporators mentioned in the letters patent, and has subsequently refused to subscribe or apply for or accept shares, it must be a statutory and not a contractual or common law liability, as there can be no privity of contract between him and a company which was not in existence when he became a subscriber. It is hardly necessary to cite authority for this, but I may refer to the recent case of *In re Northumberland Avenue Hotel Co.*, 33 Ch. D. 16. See also *Thames Navigation Co. v. Reid*, 13 A. R. 303.

The persons mentioned in the Winding-up Act as those who are liable to be placed upon the list of contributories are the shareholders and members of the company. The appellant is not a member of the company within the meaning of that term as explained in sub-section 3 of section 14. We have to consider whether he is a shareholder.

Section 2, sub-section 6, of the Companies Act, R. S. O. ch. 157, enacts that the word shareholder shall mean every subscriber to or holder of stock in the company, and shall extend to and include the personal representatives of the shareholder.

On the books of the company the appellant appears to be a shareholder, as his name is entered therein as such, and the books are by section 54 of the Act *prima facie* evidence of the facts therein stated. But they are not conclusive, and the person charged may shew that his name was put there without his authority. This, so far as the claim against him is founded on contract, the appellant has succeeded in doing. There was no application by him to the company for shares, and therefore no authority to them to allot shares or to enter his name as a shareholder, unless they derived it from his subscription to the agreement made before the issue of the letters patent.

“To constitute a binding contract to take shares in a company when such contract is based upon application and allotment, it is necessary that there should be an application by the intending shareholder, an allotment by the directors of the company of the shares applied for and a communication by the directors to the applicant of the fact of such allotment having been made.” *In re Scottish Petroleum Co.*, 23 Ch. D. 413, at p. 430.

Judgment.

 OSLER
J.A.

The question, therefore, is, whether the appellant answers the description of the persons mentioned in the Act. Is he a subscriber to stock in the company? If he is, it is because the Act makes him so, and in that event only would he be properly entered on the company's books as a shareholder.

In some of the Imperial Acts, *e. g.*, 7 & 8 Vic. ch. 110, sec. 3 ; 8 & 9 Vic. ch. 16, sec. 3, subscribers are defined to be persons who have agreed in writing to take shares in a proposed company, but who have not executed the deed of settlement. In others, persons who have already subscribed as well as those who shall thereafter subscribe are united into a company, and the directors are empowered to demand payment of the sums subscribed, and to place the subscribers upon the register of shareholders. See *Thames Tunnel Co. v. Sheldon*, 6 B. & C. 341 ; *Kidwelly Canal Co. v. Raby*, 2 Price 93 ; *Burke v. Lechmere*, L. R. 6 Q. B. 297 ; *Portal v. Emmens*, 1 C. P. D. 201, 664.

In all such cases liability is directly imposed upon previous subscribers by the terms of the Act. So in cases arising under the Companies' Act, 1862, the signing of the memorandum of association is by force of the 23rd, 38th, and 74th sections of the Act deemed to be a contract to take shares and to make the parties to it liable as contributories when placed on the register. Lindley on Partnership, 4th ed., vol. 1, 158-9 ; *In re Scottish Petroleum Co.*, 23 Ch. D. 413, at p. 429 ; *In re Florence Land Co.*, 29 Ch. D. 421, at pp. 427-8, 444.

Our Act contains no definition of the term subscriber,

Judgment.

OSLER
J.A.

but, looking at section 44, which enacts that the directors may call in and demand from the shareholders all sums of money by them subscribed, when and where and in such payments as the letters patent or the Act or the by-laws of the company prescribe or allow, I think a subscriber may, for the purpose of the Act, be described "as a person who has put down his name to a contract by which he binds himself to contribute to the extent of the number of shares for which he puts down his name."

This, however, carries the case no further, for the expression, "a subscriber to stock in the company," must mean by a contract with the company, unless the Act has given it a wider meaning, and this, in my opinion, it has not done.

An examination of the 4th, 6th, 7th, and 42nd sections of the Act will shew that the security which the Legislature provides for the protection of persons dealing with the company at the moment of its inception, is to be ascertained by the charter itself, or by the instrument upon which it is required to be founded, the object being that the public may not be misled as to the names and character of the persons who have founded the company and have agreed to become shareholders.

The charter may be granted to any number of persons not less than five who shall petition therefor, constituting such persons and *others who may become* shareholders in the company thereby constituted a body corporate, &c.—Section, 4.

The applicants are to give the prescribed notice of their intention to apply for the charter, stating, *inter alia*, the amount of the capital stock of the intended company: the number and amount of the shares and the names and addresses, &c., of each of the applicants.—Section 6, (d), (e), (f).

If the petition is not signed by all the shareholders whose names are proposed to be inserted in the letters patent, it shall be accompanied by a memorandum of association, signed by all the persons whose names are to be

so inserted &c. containing the particulars required by section 6.—Section 7, (4).

Judgment.

OSLER
J.A.

If the letters patent make no other definite provision, the stock of the company *so far as it is not allotted thereby*, shall be allotted when, and as the directors by by-law or otherwise ordain.—Section 42.

The shareholders, then, at the date of the issue of the letters patent, are those persons only who are named therein, and to whom stock is allotted thereby, and these are the signers of the petition and of the memorandum of association. The public have no notice of any others, nor do any others hold themselves out as responsible.

It is these persons and others who may thereafter become shareholders who constitute the company. No rights are reserved to those who may have previously agreed to subscribe for or to take stock but who have not chosen to become parties to the petition or memorandum of association, for the allotment of the stock, so far as it is not allotted by the charter, is left to the uncontrolled discretion of the directors.

I see nothing in the Act which binds a person in the situation of the appellant to take shares in the company or which justifies the directors in putting his name upon the stock register.

As between the company and himself the alleged agreement is mere waste paper, it being neither an actual contract with the company, nor made so by the Act, and, that being so, it cannot in itself have any efficacy even as an application to the company for shares, so as to be the foundation of an actual contract with the company. In this view the appellant's request that his signature should be cancelled is of no importance one way or the other, although it would not have relieved him if we had been compelled to yield to the liquidator's contention that the Act made him a subscriber.

I have said that the alleged agreement cannot, by itself and without more, constitute an application, for I have no doubt that an application for shares may be prepared

Judgment.

OSLER
J. A.

and signed previous to the formation of the company, and entrusted to a promoter or broker or other person interested in the company, to be made use of or acted upon afterwards. Or a person desirous to become a shareholder may authorize an agent beforehand to apply for shares on his behalf upon the incorporation of the company: *Lawrence's Case*, L.R. 2 Ch. 412 at p. 421; *Oakes v. Turquand*, L.R. 2 H.L. 325. All I mean to say is, that we cannot infer such authority to any one from the instrument in question, and cannot treat it as an application to a company which had not even an inchoate existence.

It is clear that the appellant is not a shareholder, and that the order to settle him on the list of contributories should be discharged.

I may add that the question raised on this appeal was decided by the Queen's Bench Division in the case of *Tilsonburg Agricultural Manufacturing Co. v. Goodrich*, 8 O. R. 565, in an action against the alleged shareholder for calls, in accordance with the views above expressed. The respondent relied upon a decision of the learned Chancellor in the case of *In re The Queen City Refining Co.*, 10 O. R. 264, but I think it is evident from a later decision of the same learned Judge, *Re Zoological and Acclimatization Society*, 17 O. R. 331, and his reference there to *European R. W. Co. v. McLeod*, 3 Pugs. 3, that he was under the impression that the subscription in respect of which he held the party liable was after the incorporation of the company.

MACLENNAN J. A. concurred.

Appeal allowed with costs.

BOULTBEE'S CASE

Judgment.

BURTON J. A. :—

BURTON
J. A.

The only material difference between this and Pearce's case is, that there was no repudiation here by Boulton before the issue of the letter's patent.

The case seems to be on all fours with *In re The Queen City Refining Co.*, 10 O. R. 264, and indeed the learned Judge intimates in his judgment that he followed that case, which was binding upon him.

We have already decided in the Pearce case that the subscription or agreement to take stock in a company which had then no existence, is not a binding agreement with that company to take stock in it when it comes into existence.

But if it can be treated as an application for stock, I do not see how it is possible to hold that there is any evidence here of a concluded agreement.

To quote Lord Justice Baggallay's words in *In re Scottish Petroleum Co.*, 23 Ch. D. 413, at p. 430: "To constitute a binding contract to take shares in a company where such contract is based upon application and allotment, it is necessary that there should be an application by the intending shareholder, an allotment by the directors of the company of the shares applied for, and a communication by the directors to the applicant of the fact of such allotment having been made."

The directors never did as a Board make any allotment, and it is needless therefore to add that the fact of such an allotment having been made, could not have been communicated to the appellant.

It is true the secretary assumed to treat him as a shareholder, and probably sent to him notices of calls, but this would not dispense with a regular allotment.

Test the matter in this way, if the company had turned out to be very prosperous, could the appellant have insisted upon being registered as a shareholder? It can, I think admit of but one answer.

Judgment.

BURTON
J. A.

Mr. Gregory referred to the case of *In re London and Provincial Consolidated Coal Co.*, 5 Ch. D. 525, but that case proceeded upon the provisions of the English Act which enacts that the subscriber to the memorandum of association shall be deemed to have agreed to become a member, and he thereby contracts to become a shareholder for the number of shares subscribed for and becomes absolutely bound to take them and pay the proper consideration for them. I have endeavoured to point out that there is no such contract in the present case; and even if the memorandum can be treated as an application, no allotment.

Seeing that for nearly seven years no attempt was made to enforce this subscription it is not unreasonable to assume that the company were willing to accept those of the original subscribers who volunteered to remain shareholders, and may explain why a formal allotment was never made.

I am of opinion that the appellant was improperly placed upon the list of contributories, and that the appeal should be allowed.

OSLER J. A. :—

There is no substantial distinction between this case and Pearce's case in which we have just given judgment. There is a slight, though not material, difference in the form of the alleged contract. The appellant and a number of other persons agreed, not saying with whom, "to accept the number of shares set opposite" to their signatures in the stock-book of the company, and to pay \$5.00 per share on the same at the time of allotment. But the company had not then been incorporated, and the appellant was not one of the applicants for the charter and did not sign, so far as appears, the memorandum of association, if there was one, mentioned in section 7, sub-section 4, of the Ontario Joint Stock Company's Act, R. S. O., 1877, ch. 150; R. S. O., 1887, ch. 157. The persons who hold themselves out to the world as the shareholders in and subscribers

to stock in the company at the time of its incorporation, are the applicants for the charter and the signers of the memorandum, and they and others who may afterwards become shareholders, constitute the company. The appellant was not a subscriber to stock in the company, and was not bound to accept shares therein, for the instrument he signed was not an agreement with the company, and the Act has imposed no liability upon him in respect of it. The reasons given by me in Pearce's case for holding that the paper signed by him could not by itself be regarded as an application for shares in the company when it should become incorporated, apply quite as forcibly to that signed by the appellant. In the absence of evidence that any one was authorized to use it when the company came into existence, and to apply for shares on behalf of the appellant, it is, so to speak, no more than a declaration in the air that he would accept shares in such a company and binds him to no one. Even, however, if it could be looked upon as an application there is no evidence that any shares were in fact allotted by the directors of the company. The appellant was, therefore, neither a subscriber to stock in the company, nor did he after its incorporation become a shareholder by contract evidenced by application and allotment of shares. *Quidcunque videt*, he is not a shareholder within the meaning of the Act, and is not liable to be placed on the list of contributories.

Judgment.

OSLER
J.A.

MACLENNAN J. A. concurred.

Appeal allowed with costs.

BLACKLEY V. KENNY.

Voluntary conveyance—Right of creditor with whose knowledge and assent it is made to complain—Mortgage to secure past and future advances—Future advances after notice of voluntary conveyance—Practice—Reasons for judgment appealed from.

Where a debtor at the express instance and under the advice and with the assent of a creditor who holds, to secure past and future advances, a mortgage upon certain of the debtor's land, makes a voluntary conveyance of his equity of redemption in that land to his wife, that creditor cannot afterwards contend that the conveyance is voluntary and void as against him.

Such a mortgagee cannot charge against the land under his mortgage any advances made after notice of the conveyance.

Hopkinson v. Roll, 9 H. L. C. 514, and similar cases, considered and applied.

Where no written judgment has been delivered by the Court appealed from, a statement of the grounds assigned therefor should be obtained from the reporter or from notes of counsel who attend to hear judgment, and should be inserted in the appeal book.

Order of *Boyd, C.*, reversed.

Statement.

THIS was an appeal by the defendants, the Kennys, from an order of *Boyd, C.*, dismissing with costs an appeal by them from the report of Mr. Winchester, Official Referee.

The plaintiff was a member of the firm of D. McCall & Co., merchants carrying on business in the city of Toronto, and brought this action, as trustee for that firm, upon a mortgage dated the 17th of January, 1883, made by the defendant John Henry Kenny, (his wife Margaret Jane Kenny joining to bar her dower) to the plaintiff, purporting to secure all money due or thereafter to become due by the mortgagor to the firm of D. McCall & Co. for purchases, cash advances, interest or otherwise.

Subsequently to the making of this mortgage, and on or about the 1st of September, 1884, the defendant John Henry Kenny conveyed to his wife, the defendant Margaret Jane Kenny, the property mortgaged by him to the plaintiff; this conveyance being made for the alleged consideration of \$4,000, and being subject to the plaintiff's mortgage, which the grantor covenanted to pay off and discharge when due. The defendant John Henry Kenny subsequently

became involved and made an assignment for the benefit of his creditors to the defendant Ferguson on or about the 26th of April, 1887. Statement.

In the statement of claim it was alleged that the defendant Ferguson claimed to be entitled to the equity of redemption in the property described in the mortgage, as assignee for the benefit of creditors of John Henry Kenny, on the ground that the conveyance of the 1st of September, 1884, was voluntary and void as against creditors. The defendants, the Kennys, alleged in their statement of defence, that the mortgage was only intended to secure one sum of \$2,000, and was never intended to secure past and future indebtedness and advances in general, and that the mortgage had been paid off and ought to be discharged. They also alleged that the conveyance of the 1st of September, 1884, was made with the knowledge and consent of the plaintiff and his firm, at a time when the defendant John Henry Kenny was perfectly solvent and competent to make the conveyance. The defendant Ferguson said in his statement of defence that he had, under instructions from the creditors of John Henry Kenny, taken proceedings, which were then pending, to set aside the conveyance of the 1st of September, 1884, as voluntary and void as against creditors.

By an order of the Master in Chambers, made on the 18th of October, 1887, it was ordered that it be referred to John Winchester, Esq., Official Referee, to enquire and report whether there was any, and if any, what sum of money due to the plaintiff in respect of the mortgage security in question in the action.

While the reference in this action was pending before the referee the other action brought by the assignee to have the conveyance declared voluntary and void as against creditors was also pending before the same referee, and he decided in that action against the validity of the conveyance, and this finding was affirmed on appeal by BOYD, C., and by this Court. See *Ferguson v. Kenny*, ante p. 276.

Statement. In the present action the referee found by his report that there was due to the plaintiff under the mortgage \$4,083.52 (this sum including purchases and advances made after the 1st of September, 1884), and that the defendant Ferguson was entitled to the equity of redemption in the lands covered by the mortgage in question. The latter finding was mainly based upon the finding in the other action, no evidence sufficient to support such a finding being given in this action.

It was proved in this action that the conveyance of the 1st of September, 1884, was made at the suggestion of the plaintiff and with his advice and consent.

The defendants, the Kennys, appealed from the report of the referee, but their appeal was dismissed with costs. Thereupon they appealed to this Court, and their appeal came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 15th and 16th of October, 1889.

A. C. Galt, for the appellants. There is no evidence whatever in this action that the conveyance of the 1st of September, 1884, was voluntary and void. The evidence in the other action of *Ferguson v. Kenny* cannot be read in this action, and the finding in the other action does not bind in this one: Daniell's Chancery Practice, 6th ed. pp. 596, 597. At any rate the plaintiff in this action is not in a position to raise this contention. He stood by and allowed the conveyance to be made, and consented to its being made, and cannot now complain: Kerr on Fraud, 2nd ed., pp. 98, 99 and 176; Bump on Fraudulent Conveyances, 3rd ed., p. 465; May on Fraudulent Dispositions of Property, 2nd ed., p. 181; *Olliver v. King*, 8 D. M. & G. 110. The conveyance being valid as against this plaintiff he cannot charge against the land under this mortgage any advances made after notice of it: *Hopkinson v. Rolt*, 9 H. L. C. 514; *London and County Banking Co. v. Ratcliffe*, 6 App. Cas. 722; *Union Bank of Scotland v. National Bank of Scotland*, 12 App. Cas. 53; *Bradford Banking Co. v. Briggs*, 12 App. Cas. 29.

Walter Macdonald, for the respondent, the plaintiff. **Argument.**
The finding in *Ferguson v. Kenny*, that the conveyance of the 1st of September, 1884, is voluntary and void as against creditors, is binding in this case: *Gillies v. How*, 19 Gr. 32. The mortgage is taken to secure a running account, and the ultimate balance is what has to be arrived at, and what is chargeable against the land: *Cameron v. Kerr*, 3 A.R. 30; *Moffatt v. Merchants Bank*, 11 S. C. R. 46.

George Kerr, Jr., for the assignee.

A. C. Galt, in reply.

November 12th, 1889. HAGARTY C. J. O.:—

Two important questions must be decided on this appeal:—

1st. Can the plaintiff Blackley be heard to urge that the deed made by Kenny to his wife was fraudulent and void as against him in common with the other creditors, such deed having been made at his express instance and advice?

2nd. Can he claim under his mortgage to secure future advances for any advances or supply of goods made by his firm after notice of the property having been assigned to the wife?

It is hardly necessary to discuss a question raised as to the decree in the former case of *Ferguson v. Kenny*, in which the deed to the wife had been declared void as against creditors, being admissible in evidence to prove that fact in this suit by one not a party to the former.

As to the first. The evidence is very clear that this deed was made to Mrs. Kenny at the plaintiff's suggestion.

The mortgage was dated 17th of January, 1883; the deed to the wife 1st of September, 1884.

I think it impossible to hold that as against this plaintiff the deed can be held fraudulent and void merely because he was a creditor at the time of its execution. It purports on its face to be for a consideration of \$4,000, and it was executed at the instance, and with the advice and coöpera-

Judgment.
HAGARTY
C.J.O.

tion of the plaintiff. The mortgage to his firm is declared to be a prior security on the land, and we must hold him as fully acquiescing in the perfect propriety of this deed to the wife as based on valid legal consideration, and as in no way a fraud upon him. The deed was, and is, of course, perfectly good between the parties. The law is well stated in Kerr on Fraud, 2nd ed., p. 176 :—
“As between the parties themselves and all persons claiming under them in privity of estate, voluntary conveyances are binding ; but in so far as they have the effect of delaying, defrauding, or deceiving creditors, voluntary conveyances are not *bond fide*, and are void as against creditors to the extent to which it may be necessary to deal with the property to their satisfaction. To this extent and to this extent only, they will be treated as if they had not been made.”

It remains to consider the second point, viz. : after notice of the conveyance to the wife of the 1st of September, 1884, can the plaintiff claim on his mortgage for any advances made after that date ?

The cases cited by Mr. Galt fully support the doctrine contended for by him, as to notice of a subsequent mortgage or sale for value.

The subject is treated in Fisher on Mortgages in the edition of 1876, vol. II. p. 613, the case of *Hopkinson v. Rolt*, 9 H. L. C. 514, being cited.

The author had in former editions expressed his opinion against the right to claim future advances after notice of a subsequent mortgage, and refers to the case in the House of Lords as bearing out his view.

In Coote on Mortgages, 5th ed., p. 898, it is said that, although a mortgage is expressly made to secure the sum then lent, and also further advances, and although the second mortgage is taken with notice of the first, yet the further advances with notice of the second mortgage cannot be tacked against it.

In *Hopkinson v. Rolt*, 9 H. L. C. 514, the whole question seems exhaustively treated. The Lord Chancellor says (at

p. 534):— “Although the mortgagor has parted with the legal interest in the hereditaments mortgaged, he remains the equitable owner of all his interest not transferred beneficially to the mortgagee, and he may still deal with his property in any way consistent with the rights of the mortgagee. * * The consequence certainly is that, after executing such a mortgage as we are considering, the mortgagor, by executing another such mortgage, and giving notice of it to the first mortgagee, may at any time give a preference to the second mortgagee as to subsequent advances, and, as to such advances, reduce the first mortgagee to the rank of *puisne* encumbrancer. But the first mortgagee will have no reason to complain, knowing that this is his true position, if he choose voluntarily to make farther advances to the mortgagor.”

Judgment.

HAGARTY
C.J.O.

This case is fully adopted and followed in *London and County Banking Co. v. Ratcliffe*, 6 App. Cas. 722. There, after a mortgage securing farther advances, the mortgagor sold the premises for value. Lord Blackburn, (at p. 738,) noticing Lord Cranworth's dissent from the majority of the Lords in *Hopkinson v. Rolt*, says: “I do not enquire whether if the doctrine for which Lord Cranworth contended had been adopted by the House, and was the law as to advances by a second mortgagee, it would have applied to payments by a purchaser. I doubt it; but it being decided by this House that it was not law as to a second mortgagee, it follows, *a multo fortiori*, that it was not law as to a purchaser.” In this latter case, a large portion of the purchase money was unpaid, and the vendee, when contracting to purchase, had notice of the terms of the original equitable mortgage to the bank.

The latest case is also in the House of Lords, *Union Bank of Scotland v. National Bank of Scotland*, 12 App. Cas. 53. It was a contest between two banks. The first were (in substance) mortgagees with a clause to cover further advances; the second were (in effect) mortgagees to secure an existing liability merely; notice of the second

Judgment. was given to the first, and after such notice further advances were made by the first mortgagees. It was held they could not be recovered.

HAGARTY
C.J.O.

We cannot see how this law must not be applied to the case before us.

The mortgagor, as between him and the mortgagee, had the right to dispose of his equitable interest as he did. The wife is, for the purposes of this suit, a purchaser, and, as already pointed out, the plaintiff cannot dispute her position as such.

The result will be, that the plaintiff's claim cannot include advances made after notice of the deed of September 1st, 1884.

OSLER J. A :—

I think the appeal must be allowed.

We have no note whatever of the learned Chancellor's judgment, and therefore cannot tell how the case was presented to him, except so far as that may be surmised from the objections to the referee's report, or what view he took of it. A Judge cannot be expected to write his judgment in every case, but I think we have reason to complain that counsel who attend to hear judgment do not at least furnish from their own, or the reporter's notes, some statement of what was said by the Court or Judge in pronouncing it. I do not speak of this case alone; the omission is one which too frequently occurs, and speaking for myself I find it most unsatisfactory, when I am compelled to join in reversing a judgment, to do so in ignorance of the views which may have led the Court below to pronounce it.

Under the decree in this case, it seems very clear that the referee had no power to enter into the question whether the deed from John Henry Kenny to the defendant Margaret Jane Kenny was voluntary and void as against his creditors. That was a question raised by the pleadings for trial in the action, and the decree gives it the go-by, and simply directs a reference to enquire and report whether

there was any, and if so what, sum of money due to the plaintiff in respect of his mortgage security in question. The referee, therefore, was not authorized to enquire whether the defendant Ferguson, as Kenny's assignee under the Assignments and Preferences Act, was entitled to the equity of redemption instead of Mrs. Kenny under the deed from her husband already referred to. That question no doubt might, under the present practice, have been referred to him for trial and report. I am merely pointing out that it was not in fact referred: *Bickford v. Grand Junction R. W. Co.* 1 S. C. R. 696; *Greenstreet v. Paris*, 21 Gr. 229.

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OSLER
J.A.

Assuming, however, that such an enquiry was open under the decree, I am clearly of opinion that the evidence shews that the plaintiff was not in a position to impeach Mrs. Kenny's deed as being void against himself and Kenny's other creditors under the statute, on the short ground that it was made to her at his instance and with his assent. He is estopped from complaining of it. When, therefore, she became the owner of the equity of redemption, his right to charge the property with further advances made to her husband, on the footing of his previous mortgage, ceased, and the referee ought to have taken the credit side of the account, as between the plaintiff and Kenny, as it stood on the 1st of September, 1884, the date of the deed to the wife. For this proposition it is only necessary to refer to *Hopkinson v. Rolt*, 9 H. L. C. 514; *London and County Banking Co. v. Ratcliffe*, 6 App. Cas. 722; *Union Bank of Scotland v. National Bank of Scotland*, 12 App. Cas. 53; *Bradford Banking Co. v. Briggs*, 12 App. Cas. 29.

There was no suggestion that the sum named in Kenny's deed as the consideration, was the real consideration, or that it was ever intended to be paid. This, it is clear, Blackley must have known, and therefore there can be no pretence for the argument, which was not indeed addressed to us, that the charge for further advances might be supported as against the supposed purchase money in Mrs.

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OSLER
J.A.

Kenny's hands. The debit side of the account must of course be taken, as regards payments made by Kenny after the date of the wife's deed, by applying to the evidence on that subject, when it is in, the ordinary rules of law as to the appropriation of payments. The decree must, therefore, be reversed, and the case sent back to the referee to proceed in accordance with this intimation.

MACLENNAN J. A. :—

I agree with the judgment of the Chief Justice, but I desire to add that in my opinion it is immaterial whether the conveyance to Mrs. Kenny was or was not voluntary, or whether the \$4000 mentioned therein was or was not intended to be paid. The principle on which *Hopkinson v. Rolt*, 9 H. L. C. 514, and the cases which have followed it, proceeded, was that a mortgagor was the owner of the property subject to the mortgage, and could deal with it with perfect freedom subject to the mortgage. It follows from that principle that he may make a gift of the property subject to the mortgage with precisely the same effect as a disposition for value, and that a subsequent advance made by the mortgagee would in the one case as well as in the other be an attempt to lend money to one man on the security of property belonging to another.

It was contended for the respondent that the result of the former action against Mrs. Kenny in which the conveyance to her was declared fraudulent against creditors was to be regarded as in evidence before the learned referee in the present case, and it is said the learned Chancellor so regarded it. I do not see that the former judgment was in any way proved in this case, and certainly the learned referee could not properly take notice of it simply because the other action stood referred to him. I do not, however, see how that judgment could have helped the respondent, even if admitted or proved in this action, for the deed complained of having been made with his knowledge and consent, and indeed under his advice, he certainly cannot

be heard to complain of it; he was not defrauded by it, and it is binding on him, and upon the grantor Kenny, and it has only been set aside as against creditors who were defrauded.

Judgment.

MACLENNAN
J. A.

The appeal should, therefore, be allowed; the judgment of the learned Chancellor should be reversed; there should be no costs of the appeal from the official referee; and it should be declared that advances made by the plaintiff or his firm after the deed to Mrs. Kenny should be disallowed, and the case should be referred back to the referee.

BURTON J. A. concurred.

Appeal allowed with costs.

GRANT V. CORNOCK.

Husband and wife—Breach of promise of marriage—Justification of breach—Statute of Limitations.

In an action for breach of promise of marriage bodily unchastity subsequent to the promise is a defence, but not that the woman was in the habit of swearing, or of using coarse, obscene, or profane language.

Quære, whether evidence of the latter matters can be admitted in mitigation of damages.

Mere lapse of the time fixed for the marriage, when the parties continue thereafter to conduct themselves as engaged persons, is not necessarily a breach of the promise. There must be a refusal or something equivalent to a refusal after the time fixed for performance before the Statute of Limitations begins to run.

Judgment of the Queen's Bench Division affirmed.

Statement.

THIS was an appeal by the defendant from the judgment of the Queen's Bench Division, reported 16 O. R. 406.

The action was one to recover damages for breach of promise of marriage, and the writ was issued on the 12th of March, 1888. In the statement of claim it was alleged that between the 1st of October, 1878, and the 10th of March, 1888, the defendant frequently promised to marry the plaintiff, who, on her part, then promised to marry the defendant, and that the engagement to marry continued till the last mentioned date, when the defendant married another woman. The defence was a denial of the allegations in the claim, and an allegation that the cause of action did not accrue within six years before suit.

The action came on for trial before ROSE, J., and a jury, at Guelph, on the 1st of May, 1888, when the defendant was allowed to amend by setting up that the engagement was finally terminated in May, 1881, by the defendant refusing to marry the plaintiff, and by adding the following special pleas :

"The defendant further says, that he was justified in terminating such engagement, and in refusing to marry the plaintiff, by reason of the conduct of the plaintiff, who on several occasions fell into fits of rage with the defend-

ant, and used coarse, obscene, and profane language to other persons, in private houses and in public places, particularly to one Annie Dodds, and to one John H. Collier ; and the plaintiff became and was addicted to the habit of profane swearing, and indulged in such habit on the public streets, wherefore the defendant, upon discovering the same, broke off such engagement, and refused to marry the plaintiff. Statement.

“The defendant says that he was justified in refusing to marry the plaintiff, by reason of the plaintiff’s improper conduct in resorting to houses of improper character, in associating publicly with other men, in swearing profanely, both in public and in private, in singing, when in company with men, obscene songs, and in using, when in such company, obscene and indecent language.”

Evidence was then given, and it was proved that in October, 1878, an engagement to marry at the end of six months was entered into ; that shortly after this the defendant said he could not marry the plaintiff until after the death of his father, and that the plaintiff acquiesced ; that after the death of the father, which occurred in April, 1879, the defendant said he could not marry the plaintiff until a division of the father’s estate between himself and his brother, under the terms of the father’s will, was effected, and that the plaintiff acquiesced.

The division was not effected until 1887. The defendant contended that the engagement was broken off by him on the 24th of May, 1881. The plaintiff and he had a quarrel on that day, and after some strong language on both sides, the plaintiff said she would the next day enter an action against him, and he told her to go ahead, that he was not going to marry her after the way she had been carrying on. The defendant admitted, however, that after this he continued to visit the plaintiff “frequently, perhaps once or twice a week,” till the 26th of March, 1884, when he went to British Columbia. where he remained nearly a year. The defendant said that after his return he never visited the plaintiff, but she denied this, and said that he continued to visit her until March, 1887, when his visits ceased. In February, 1888, he married another woman.

Statement.

Evidence was tendered by the defendant in support of the amended defence, but was rejected by the learned Judge on the ground that such matters, even if proved, would not justify the breach; and also on the ground that such matters, even if a justification, were not in fact known to, or relied on by, the defendant at the time of the breach, and could not be invoked when they came to his knowledge. The plaintiff and some other witnesses had, however, been cross-examined upon these matters.

The following were the questions put to the jury, and their answers thereto:

1. When the agreement to marry was made, was it to marry within six months? A. Yes.

2. Was it agreed that the marriage should not be until his father's death? A. Yes, by request of the defendant.

3. After the father's death in April, 1879, did the defendant, in response to a question by her, say that all was left to his brother William to share, and until his brother shared with him, he could not marry her? A. Yes.

4. Did the plaintiff exonerate or free the defendant from his promise? A. No.

5. What damages do you allow? A. \$1.100.

6. Was there in, say 1881, a refusal by the defendant to marry, and was his refusal for good and sufficient reasons? A. We believe there was a refusal, but not on good and sufficient reasons. Neither was the engagement broken.

HIS LORDSHIP.—With reference to the first and second questions, do you mean the contract was in the first place to marry within the six months, and then after that it was agreed that it should not be until the father's death?

JURYMEN—Yes.

HIS LORDSHIP—And with reference to the last question, your answer is "We believe there was a refusal, but not on good and sufficient reasons. Neither was the engagement broken." What do you mean by that?

JURYMEN—There might have been refusal in the heat of passion, but his conduct showed that the engagement was carried on.

HIS LORDSHIP—You don't believe there was a refusal for the purpose of putting an end to the engagement? Statement

JURYMEN—No.

Upon these findings the action was dismissed with costs, the learned Judge holding that it was barred by the Statute of Limitations. This judgment was reversed by the Divisional Court, and judgment entered in the plaintiff's favour for the amount of damages assessed.

The defendant appealed, and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.) on the 16th of October, 1889.

Robinson, Q.C., and *G. F. Shepley*, for the appellant. The question is, whether what took place was merely a continuation and ratification of the original promise or was a new agreement. If the former, the action was barred, as admittedly the original promise was made in 1878, and was to marry in six months. The former is the true way of looking at this case. There was mere acquiescence in the postponement of the marriage, but nothing to keep the right alive; nothing that would have been a bar to an action by the plaintiff after the six months expired: *Frost v. Knight*, L. R. 7 Exch. 111. If mere acquiescence keeps the right alive then the statute would never begin to run until the defendant had actually put it out of his power to complete at all. Mere continuance upon the terms of engaged persons would not work a renewal of the engagement each time that the parties met upon those terms. Where there is an actual promise any renewal of it relates back to the date of the original promise, and is a mere ratification of it. That is clear under the Infant's Liability Act, and the principle here is the same: *Coxhead v. Mullis*, 3 C. P. D. 439. This case is governed by *Costello v. Hunter*, 12 O. R. 333, which is well decided. The cases relied on by the Chief Justice in the Court below are distinguishable. In *Northcote v. Doughty*, 4 C. P. D. 385, there was a distinct finding by the jury as to the new contract. In

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Ditcham v. Worrall, 5 C. P. D. 410, the Judge was drawing inferences of fact as a jury. In *Holmes v. Brierley*, 4 Times L. R. 571, and 647, there was also a distinct finding by the jury. Here, however, the jury in answer to the third question merely find that a certain excuse for putting off the marriage was given by the defendant, and that is not sufficient. If the defendant's view of the meaning of this answer is not adopted he is at least entitled to a new trial. There should be a new trial also on the ground of rejection of evidence. A contract to marry is like a contract of service where the master may justify a dismissal on grounds not known to, or acted upon by, him at the time of dismissal. The right to refuse to marry depended on the actual facts, and should not be limited to the facts the defendant knew at the time. The facts here set up would, if proved, justify the refusal to marry, and the defendant should be given an opportunity of proving them. It is not necessary to show actual bodily unchastity. Language and conduct of the kind here set up would be sufficient, and the true rule is, that matters such as those set up should be submitted to the jury, with instructions that in considering whether they afforded a justification to the defendant for his refusal to marry the plaintiff, they should take into account the position in society and the circumstances, otherwise, of the parties. The only support for the proposition that actual physical unchastity must be shown is to be found in cases decided at a time when the manners and customs of society were very different from those of the present day. There are dicta to the contrary in comparatively recent English cases, and the American authorities are clear. See *Hall v. Wright*, E. B. & E. at p. 794; *Beachey v. Brown*, E. B. & E. at p. 803; *Baker v. Cartwright*, 10 C. B. N. S. 124; *Vanstork v. Griffin*, 77 Pa. St. 504; *Sprague v. Craig*, 51 Ill. 288; *Boynton v. Kellogg*, 3 Mass. 189; *Palmer v. Andrews*, 7 Wend. 142; *Willard v. Stone*, 7 Cowen, 22; *Berry v. Bakeman*, 44 Me. 164. At any rate evidence of these matters should have been received in mitigation if not in bar.

W. Nesbitt, and *A. W. Aytoun-Finlay*, for the respondent. Argument. There was clearly a new agreement to marry when the estate was divided, and the statute did not begin to run till there was a breach after that division took place. Even if there had been a refusal before the expiration of the time fixed, that would not cause the statute to run. The plaintiff would be entitled to wait till the time fixed had expired, and then, if there were a refusal, or if there had been such conduct by the defendant that performance was impossible, the statute would begin to run: *Atchinson v. Baker*, 2 Peake 103; *Cole v. Cottingham*, 8 C. & P. 75. The findings of the jury are clear, and there is ample evidence to support them. The defendant continued to visit the plaintiff till 1887, as her affianced lover, and each time they met in this relationship the original promise was revived. *Costello v. Hunter*, 12 O. R. 333, is wrongly decided. That case treats the contract to marry like a contract of debt, and decides that a new consideration is necessary in order to make a new starting point for the statute. But that is not right. A mere oral promise without consideration, or an implied promise, is enough, and clearly the jury were justified in finding such a promise here. Then in *Costello v. Hunter* no time was fixed for completion, but here there was. This is not a case of ratification of something entered into at a former time, but a new agreement by the defendant to marry founded on the good consideration of the plaintiff's willingness to marry him. There is no right to a new trial. The defendant cannot justify by proof of facts not known to, or relied on by, him at the time of the breach, and at any rate the facts here set up afford no justification. Nothing but want of physical chastity is a defence, and the promise must be broken on that account: Chitty on Contracts, 11th ed., p. 511; Roscoe, N. P., 15th ed., p. 445; *Irving v. Greenwood*, 1 C. & P. 350, and note; Sedgwick on Damages, 6th ed., p. 369; Mayne on Damages, 4th ed., p. 361; Macqueen on Husband and Wife, 3rd ed., p. 202; *State v. Brinkhouse*, 34 Minn. 285. Unless this were so there would be

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no way of drawing the line. The evidence was not in fact tendered in mitigation, but only in bar. At any rate it would not be admissible even in mitigation, for on that head evidence of general reputation only can be given and not evidence of specific acts: *Jones v. James*, 18 L. T. N. S. 243. Then the defendant did, in fact, have an opportunity of proving the allegations. The plaintiff denied them, and her denial concludes the matter.

Robinson, in reply. The evidence was admissible both in mitigation and in bar: *Leeds v. Cooke*, 4 Esp. 256.

November 12th, 1889. HAGARTY C. J. O.:—

I am unable to see why it was necessary to devote so much time to the discussion on the Statute of Limitations. The action was brought in March, 1888, and there was quite sufficient evidence to leave to the jury of a contract of marriage within a year, say from March, 1887.

The plaintiff very naturally went into evidence of the commencement of the engagement, ten years before the action was brought, as a strong circumstance bearing on the injury she claims to have received from the breaking of the contract. There was, however, quite sufficient evidence to be submitted to the jury of a contract and of its breach within six years, wholly irrespective of the earlier evidence.

Then as to the matter pleaded in bar of the action, at the trial allowed to be put on the record, as to justifying the breach of contract. [The learned Chief Justice read the pleas and continued :]

These pleas were expressly pleaded in bar of the action. We are all of opinion that they do not disclose any legal bar or justification. We think the majority of the Queen's Bench Judges rightly so held. A perusal of the cases *Hall v. Wright*, E. B. & E. 746; *Beachey v. Brown*, *ib.* 796; *Baker v. Cartwright*, 10 C. B. N. S. 124, leads I think clearly to that conclusion.

In these cases the general law is discussed very fully, and

I consider the upshot of the authorities to be that want of chastity—bodily chastity—is apparently the only justification for breach of the contract open to a defendant setting up a defence of the present character.

Judgment.

HAGARTY
C.J.O.

So far as the plaintiff's conduct was concerned, it is difficult to understand how the matters stated in the defendant's pleas could bar the action; they all seem to amount to matters of manners and social habits. We cannot see what should be the standard. It must always be a question of degree and of social habit, and it would be as unwise as it would be invidious to attempt the creation of any positive rule. We all know, if not personally, then certainly historically, that language and general expression as to certain topics was formerly much coarser and perhaps profane in expression than at present, and that what might now be considered indecent or even obscene, was formerly but lightly criticised or noticed; so also was it with habits of life and conduct. The change may be more or less marked according to the social position of parties—in some cases according to locality or mode of life. But the law, we think wisely—for the general guidance of life—declines to absolve the breaker of such a contract on the grounds assigned in this action.

It is then urged that at all events the evidence should have been received and left to the jury as in mitigation of damages. The answer to this seems to be that the evidence was not tendered in mitigation of damages.

[The learned Chief Justice discussed the reporter's notes of the proceedings and came to the conclusion that the evidence had been tendered in bar only, and had in fact to a considerable extent been gone into on cross-examination of the plaintiff and her witnesses, and continued:]

I think the defendant cannot be heard urging such rejection against the verdict.

The plaintiff could with much better reason have complained had the verdict been for the defendant, as matters not amounting to a defence were permitted to be laid before the jury. The defendant has succeeded in proving the largest part of his insufficient defence. We can see

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HAGARTY
C.J.O.

no reason for interfering with the verdict under the circumstances.

It would be most unfair to the plaintiff to send the case down again for trial to enable the defendant to bring forward all these matters on the footing of being proper to be urged in mitigation of damages. We are quite satisfied that the defendant would derive no benefit from such a course.

Under the statute the Court should not interfere on the ground of admission or rejection of evidence "unless in the opinion of the Court * * some substantial wrong or miscarriage has been thereby occasioned in the trial of the action." Nothing has, we think, occurred here to the legal wrong or injury of the defendant.

In dismissing this application, we are not to be understood as discussing or holding either that the matters in question were properly receivable in evidence in mitigation of damages, or whether the defendant, having cross-examined the plaintiff as to these matters, would or would not be concluded by her answers.

The subject is not free from difficulty, and we do not further discuss it.

MACLENNAN J.A. :—

I agree that this appeal should be dismissed.

There was an agreement to marry in six months, in October 1878, and then, by arrangement, the marriage was postponed until after the death of the defendant's father, which occurred in 1879. It was further postponed until after the settlement of their father's estate between the defendant and his brother, which did not take place until 1887. All this is proved in the clearest manner by the defendant's own evidence. I am at a loss to see how it can be contended either that the case fails for want of corroboration or because of the Statute of Limitations. The defendant, in the most clear and distinct manner, admits the engagement in 1878, and that, by mutual arrangement, the

fulfilment was postponed, first, until after his father's death, and again until the property of his father's estate should be settled between himself and his brother.

Judgment.

MACLENNAN
J. A.

Then, as to the Statute of Limitations, time begins to run from the breach, but the mere lapse of the time fixed for the marriage is not necessarily a breach. There must be a refusal, or something equivalent to a refusal, such as marrying another. If persons agree to marry at a certain time, but the time passes and the marriage does not take place, but they continue to act like engaged persons, I think that may go on for any length of time without there being any breach, and if they choose to fix a new day there is nothing to prevent it. In this case, before there was any breach, the parties fixed the settlement of the estate as the time for the marriage, and the estate was not settled until 1887.

But then the defendant sets up that the engagement was broken off by him on the 24th of May, 1881, more than six years before action, when they had a quarrel, and when there was some bad language used on both sides. The defendant says that on that occasion the plaintiff said she was going the next day to enter an action for breach of promise against him, and he told her to go ahead, that he was not going to marry her after the way she had been carrying on. It is plain from this that what then took place was not a mutual rescission of the engagement, and that the plaintiff did not acquiesce in the defendant's refusal. He goes on to say that after that he continued to visit her "frequently, perhaps once or twice a week," for three years, till the 26th of March, 1884, when he went to British Columbia. There is other evidence that he visited her frequently after his return from British Columbia, and the evidence is ample to justify the finding of the jury that although there was a refusal by the defendant to marry in 1881, it was not on good and sufficient reasons, and that the engagement was not broken. This last finding of the jury I take to mean that although on that occasion he did say he would not marry her, she did not agree to release

Judgment.
MACLENNAN
J.A.

him, and that the quarrel was made up and he visited her afterwards on the footing of the engagement.

But even if he had distinctly and finally refused to marry her in 1881, it is clear the plaintiff was not bound to bring her action then, but could wait until the time agreed upon—namely, the settlement with his brother;—she might have brought her action then, but not having done so, the statute did not begin to run until the estate was settled, and he had finally put it out of his power to fulfil his engagement by marrying another: *Hochster v. De La Tour*, 2 E. & B. 678: *Frost v. Knight*, L.R. 7 Exch. 111.

I am, therefore, clear that there was ample evidence to sustain the action, and that it was not barred by the statute.

But it was contended that there should be a new trial because of the improper rejection of evidence. The evidence rejected was of conduct on the part of the plaintiff, which it was contended absolutely excused the defendant from performing his engagement. It was offered in bar and for that purpose only, and was rejected by the learned Judge. It is now contended that at all events it was admissible and should have been received, in mitigation of damages. If it had been tendered for that purpose the learned Judge might have admitted it. I think it was not admissible for the purpose for which it was offered, and if it was admissible for the other purpose the defendant's counsel may be said himself to have caused its rejection by omitting, when it was rejected for the one purpose, to suggest that it was admissible for the other purpose. Under these circumstances I do not see that the defendant can properly ask us to send the case to another jury.

BURTON and OSLER, JJ.A., concurred.

Appeal dismissed with costs.

IN THE MATTER OF THE ZOOLOGICAL AND ACCLIMATIZATION
SOCIETY OF ONTARIO.

COX'S CASE.

Company—Subscriber—Shareholder—Contributory—R. S. O. (1877), ch. 150.

C., after the incorporation of a company under the Ontario Joint Stock Companies Letters Patent Act, R.S.O. (1877), ch. 150, signed a share subscription book with the following heading :—

“We, the undersigned, do hereby severally on behalf of ourselves, our and each of our several and respective executors and administrators, acknowledge ourselves to be subscribers to the capital stock of the Zoological and Acclimatization Society of Ontario for the number of shares and to the amount set opposite our several and respective names and seals hereunder ; and we do hereby covenant, promise, and agree, each with the other of us, and with S., to pay the amount of our said several subscriptions and all calls thereon, when and as the same may be called up and made under the provisions of the Ontario Joint Stock Companies Letters Patent Act, or under any by-laws which may be passed by the said company, and we request the number of shares for which we subscribe hereunder to be allotted to us.”

No shares were allotted to C., he was not entered in the books of the company as a shareholder, and never made any payments. Four years after this document was signed by C., the company was wound up, and he was held liable as a contributory :—

Held, that this document did not, in the absence of any recognition by the company of C.'s position as a shareholder, alone and *ex proprio vigore* create the liability contended for.

Order of BOYD, C., reversed.

THIS was an appeal by Cox from the judgment of BOYD, *Statement*. C., reported 17 O. R. 331, affirming the ruling of the Master in Ordinary placing the appellant upon the list of contributories of the company.

The Zoological and Acclimatization Society of Ontario was incorporated under the Ontario Joint Stock Companies Letters Patent Act, on the 2nd of September, 1881. On the 10th of October, 1884, the appellant Cox signed a share subscription book of the society with the following heading :

“We the undersigned do hereby severally on behalf of ourselves, our and each of our several and respective executors and administrators, acknowledge ourselves to be subscribers to the capital stock of the Zoological and Aecli-

Statement. matization Society of Ontario, for the number of shares, and to the amount, set opposite our several and respective names and seals hereunder, and we do hereby covenant, promise, and agree, each with the other of us, and with William B. Scarth, of the city of Toronto, Esquire, to pay the amount of our said several subscriptions, and all calls thereon, when and as the same may be called up and made under the provisions of the Ontario Joint Stock Companies Letters Patent Act, or under any by-laws which may be passed by the said company, and we request the number of shares for which we subscribe hereunder to be allotted to us."

The company went into liquidation in October, 1888, and in the winding-up proceedings the appellant was held liable as a contributory.

It was not shewn that the company kept any stock book other than that in which the subscriptions were obtained. The appellant was not entered in their ledger as a shareholder, was not charged with calls, never made any payments on account of his shares, and never attended any meetings or took any part in the management of the affairs of the company. The Master in Ordinary held however that the contract up to the words, "We request the number of shares for which we subscribe hereunder to be allotted to us," was an absolute one, and an unconditional taking of the shares, and that the addition of these words did not operate to change it into a conditional contract. This ruling was affirmed by BOYD, C., and an appeal from his order came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.) on the 18th of October, 1889.

A. C. Galt, for the appellant. This is a mere offer and not a subscription at all. There was no allotment of stock; no notices of calls were sent to the appellant, and his name was not entered on the books of the company as a shareholder. The inference is clear that the application was never accepted: *Gorriessen's Case*, L. R. 8 Ch. 507; *Nicol's*

Case, 29 Ch. D. 421. In this case the Chancellor has fol- Argument.
lowed his previous decision, *In re the Queen City Refining Co.*, 10 O. R. 264, and he also cites in support of his decision *European R. W. Co. v. McLeod*, 3 Pugs. 3. The former case, however, has now been over-ruled in this Court, and the latter case was virtually over-ruled in *Nasmith v. Manning*, 5 S. C. R. 417. In that case Ritchie C. J., who dissented, cited and followed *European R. W. Co. v. McLeod*, while the majority of the Court differed from him, and held allotment necessary. This case is stronger than *Nasmith v. Manning*, because in that case there was a direct subscription and a promise to pay upon allotment and even there it was held that allotment was necessary, the difference of opinion arising upon the question as to the evidence of allotment. See also *Denison v. Leslie*, 3 A. R. 536. In *Kingston Street R. W. Co. v. Foster*, 44 U. C. R. 552, also referred to in the judgment below, there was no reference to allotment. It is a fallacy to say that this is a contract specific performance of which might be directed. More shares might be subscribed for than the number of shares in the company, and there was no mutuality, the company not being bound, and clearly the mere subscription as such could not be specifically enforced. The cases in which liability has been fastened upon contributories upon slight grounds in order to protect creditors have no application in this case because the appellant's name never appeared on the list of shareholders, and his subscription could not have been relied on. There clearly must be something more than a mere subscription. There must be an acceptance, or something equivalent to an acceptance, by the company: *In re Portuguese Consolidated Copper Mines*, 42 Ch. D. 160; *Cartmell's Case*, L. R. 9 Ch. 691; *Gunn's Case*, L. R. 3 Ch. 40; *Ex parte Preston*, 15 L. T. N. S. 496; *Ferguson v. Wilson*, L. R. 2 Ch. 77.

W. F. W. Creelman, for the respondent. There are two ways of becoming a shareholder; either by subscription or by allotment. A subscriber must mean a person who

Argument. signs the stock book, and then no allotment or other step is necessary to make him a shareholder. Allotment is a matter of internal management, and permissive. Of course the subscription may be so worded as to make allotment necessary, or it may be necessary under some special Act governing the matter independently of the subscription, and the cases cited are all cases of one or other of these classes. Here the subscription was obtained by the company itself, and in its own book, and so it is an offer signed by them, and clearly the subscription is an acceptance of the offer previously made by the company, and no allotment is necessary.

A. C. Galt, in reply. The fact that this subscription was obtained by the company itself, makes it more clear that an allotment was necessary because they themselves put in the document prepared by themselves, the request for allotment, and thus gave themselves an opportunity of passing upon the applications that might be made. Though signed by both parties, the document remained only an offer: *In re Railway Time Tables Publishing Co.*, 42 Ch. D., at p. 113.

November 12th, 1889. HAGARTY C. J. O.:—

This appeal came before us in a singularly meagre state as regards the facts of the case.

The company obtained letters patent of incorporation under the general Act, R.S.O. (1877), ch. 150, in September, 1881.

We know nothing further of it or its proceedings until the following document called an extract from the subscription book. Cox is proved to have signed this on the 10th of October, 1884. [The learned Chief Justice read the document set out at pp. 543, 544, and continued]:

There was no evidence that the defendant's name ever appeared in any book, register, share list, or any other document except that to which his name was subscribed, or that he was ever entered or treated as a stockholder, or

that any shares were allotted to him, from the date of such signature in 1884, to the winding-up order in October, 1888, nor was any payment made by him.

Judgment.
HAGARTY
C.J.O.

It was asserted on the argument before us, and not denied, that his name did not appear, and the whole case for the liquidator was rested on his alleged liability created by his signature as proved.

I think we must assume apart from what took place on the argument, that proper books were kept by the company, as plainly directed in the statute. Section 42. The company shall cause a book to be kept by the secretary or other officer, containing: (a) a copy of the letters patent; (b) in alphabetical order the names of all person who are or have been shareholders; (c) their address and calling; (d) the number of shares of stock held by each shareholder; (e) the amounts paid in and remaining unpaid on the stock of each shareholder. This book is to be open to inspection by shareholders and creditors. Transfers are to be entered therein. The book is to be *prima facie* evidence in all suits against the company or against shareholders.

Section 49 directs, under penalties, annual returns to be made to the Government containing (*inter alia*) the number of shares taken from the commencement of the company to the 31st of December next preceding; the amount of calls on each share; the amount of calls received and unpaid; the total amount of shares never allotted or taken up; the total amount for which shareholders are liable on unpaid stock.

No account was given in evidence as to the origin of this "subscription book." There was no proof that it was even issued by or under the authority of the company, as was shewn in the New Brunswick case, cited by the learned Chancellor, *European R. W. Co. v. Macleod*, 3 Pugs. 3, where it was in evidence that the defendant's subscription was attached to a document called "the stock subscription list" prepared by a committee appointed by the company to obtain subscribers. There was no such request as here to have stock allotted.

Judgment.

HAGARTY
C.J.O.

In his judgment Sir Wm. Ritchie, then Chief Justice of New Brunswick, said: "In the English cases the application has come from persons for stock; the contract was unilateral until there had been an acceptance by the company; here there was the very reverse; the company sent forth their agents to offer the shares and when the defendant accepted he became a subscriber, and a shareholder (if there is any distinction)."

If this could have been the original subscription book of this company, with the earliest date of subscriptions in October, 1884, what was the state of affairs for the three years succeeding the date of the letters patent in 1881?

On the application for letters patent five persons have to petition, and the amount of stock taken by each applicant must be stated. (Section 5.) Under section 63, the charter shall be forfeited by non-user for three consecutive years at any time, or if the company do not go into actual operation within three years after it is granted. How this corporate body existed from 1881 to 1884, or whether any stock was in existence, is left to conjecture.

Reference is made to these matters merely in connection with the origin, nature, and authority of the document signed by defendant.

It is rather peculiar in its phraseology. The subscribers covenant with each other to pay Mr. Scarth, a gentleman not stated to be in any way connected with or acting for the company, the amount of the stock called in under the Act or the by-laws to be passed by the company, and conclude by requesting "the number of shares for which we subscribe to be allotted to us."

Now, as already noticed, we must assume the company followed the express directions of the statute, and kept a register of all shareholders, with amounts paid and unpaid on stock. The production of this is made *prima facie* evidence.

The Master's report shews that some of the shareholders whom he declares liable to contribute, did make payments. If there were books of the company shewing or naming

the defendant as a shareholder, we may safely assume, after all that took place, that they would have been produced. But in the absence of all proof beyond the production of the alleged subscription, the lapse of four years between that and the liquidation without the slightest apparent recognition of the defendant as a shareholder, and the unchallenged and reiterated assertions on the argument of the absence of his name from the company's books, I am wholly unable to see on what his liability can be safely rested.

Judgment.

HAGARTY
C.J.O.

The judgments of the learned Master and of the Chancellor appear to me to rest wholly and exclusively on the assumed unconditional character of the document signed by the defendant. As to the book or register of stockholders directed by the statute to be kept, it is quite independent of any subscription list book. It is to be always accessible to shareholders or creditors. As already said we must assume that the defendant's name is not therein.

I am unable to bring myself to believe that a subscription such as that before us, with a request to have shares allotted, can in the absence of any recognition by the company of his position as a stockholder, alone *ex proprio vigore* create the liability here contended for.

If a subscription had been for a larger amount of shares than was warranted by the charter, as might easily occur if various subscription lists had been circulated, what would be the position? Some action by the company would be absolutely necessary to fix the amount to be held by each.

In the language of Gwynne J., *Newman v Ginty*, 29 C. P. 34, there must be, "Some response either in writing or verbally, or by conduct, communicating to the defendant that the company had accepted his application and himself as a shareholder."

With deference to those who hold otherwise, I must hold to the opinion that the document signed here by the defendant does not without some such response establish his liability.

I must also respectfully doubt the proposition laid down

Judgment.

HAGARTY
C.J.O.

in the Court below. "If the stock was not given to them, each could enforce the engagement specifically, and needed to do nothing more to perfect the agreement."

I cannot ignore the request that the number of shares be allotted. If the company had allotted the shares as requested or had entered the defendant's name in their books therefor I can appreciate the argument that the contract was complete. I do not discuss any question as to notice of allotment.

I have seen no case in this country where the circumstances resembled this case in the total absence of recognition of the defendant.

Two cases are referred to in the judgment below. *European R. W. Co. v. McLeod*, 3 Pugs. 3, I have already discussed on one point. I find that the Chief Justice there notices that the second amending Act of the Legislature had positively recognized and declared the defendant to be a shareholder. The statute does certainly appear very plain on that. As to *Kingston Street R. W. Co. v. Foster*, 44 U. C. R. 552, the defendants who were held liable, had actually paid the first call.

I do not consider that any difference (if there be any) between the words "subscribers" and "holders of stock," can affect the decision in this case.

OSLER J. A. :—

If we reverse the case, and suppose an action brought by the appellant against the company for refusing to give him shares, it could not be supported on the evidence before us, for there is no act proved by which the company was bound to admit him as a shareholder, and consequently nothing to bind him to the company—in short no mutuality. It does not appear that the company either previously authorized or afterwards ratified his subscription—that it was procured at their instance, or that they in any way acknowledged it. Indeed, by the terms of the subscription, the engagement is not with the company, but by the subscribers

with each other and with Mr. Scarth, whose connection with the company is not shewn.

Judgment.
OSLER
J.A

Four years elapsed from October, 1884, the date of the subscription, to the commencement of the winding-up. Then what inference should be drawn from the absence of any proof that shares were ever allotted by the company to the appellant in accordance with the request in the alleged subscription contract, or that anything was paid upon the shares, or that the subscriber was recognized as a shareholder? Is it not that the company declined to accept or act upon the subscription if it ever came to their knowledge? I think so. Nothing was done by which the company could have been forced to receive the subscriber. It is therefore impossible to treat him as a shareholder, and the appeal must be allowed. I refer to the recent cases in this Court of *In re The Speight Manufacturing Co.*, *Boulton's Case*, ante, p. 519; *In re The London Speaker Printing Co.*, *Pearce's Case*, ante, p. 508; Angell and Ames on Corporations, 11th ed., secs. 526, 527; *Selma and Tennessee R. W. Co. v. Tipton*, 5 Ala. 787, which appears to be a very well considered case.

Such cases as *Union Fire Ins. Co. v. Lyman*, 46 U. C. R. 453; *Union Fire Ins. Co. v. O'Gara*, 4 O. R. 359, have no application, turning as they do upon the terms of the special Act of incorporation, by which the shares subscribed for at the instance of the company are declared to be vested in the subscriber. See also *Re The Standard Fire Ins. Co.*, *Kelly's Case*, 12 A. R. 486.

BURTON, and MACLENNAN, JJ. A., concurred.

Appeal allowed with costs.

ROSS ET AL. V. DUNN ET AL.

Bills of sale and chattel mortgages—Assignments and preferences—Present advance—Execution creditor following proceeds when mortgaged goods sold—Security taken by partner in his own name to secure partnership debt—Affidavit of bona fides—Debt represented by paper under discount.

A mercantile firm to whom a customer was indebted on unmatured paper, part of which was under discount at a bank, in good faith and in the honest belief that it would enable him to carry on his business agreed to make a fresh advance to him of about one half of his indebtedness to them, and took from him to one of the firm a chattel mortgage for the whole amount, the mortgagee making the usual affidavit of *bona fides*. When the mortgage was executed a cheque for the fresh advance was given to the customer who, pursuant to a subsequent arrangement, did not use it, but afterwards drew at intervals on the firm until the amount of the cheque was paid, when it was returned:—

Held, [BURTON, J.A., doubting but expressing no opinion on this point], affirming the finding of fact at the trial, that even if the mortgage was defective under the Chattel Mortgage Act yet the plaintiffs' execution creditors were not entitled to prevail, because the mortgagee had taken actual possession of the goods before the delivery of the writ to the sheriff:—

Held, also, that the mortgage was valid. (1) Under the Chattel Mortgage Act: though the debt was due to the partnership, one partner could properly take the mortgage and make the affidavit of *bona fides*, and it was a mortgage to secure a present actual advance, and not future advances so as to come within section 6 of the Act. (2) Under the Assignments and Preferences Act; because the advance was made in the *bona fide* belief that the mortgagor would thereby be enabled to continue his business and pay his debts in full.

Per BURTON, and OSLER, J.J.A. Even if the mortgage had been invalid and the mortgagee had taken possession and sold after the delivery of the writ an action for an account of the proceeds would not lie against him at the suit of the execution creditor. His only remedy would be to follow the goods, and seize them under his execution.

Judgment of BOYD, C., affirmed.

Statement. THIS was an appeal by the plaintiffs from the judgment of BOYD, C., at the trial, dismissing the action with costs.

The plaintiffs were execution creditors of the defendant, Jean Baptiste Dunn, who carried on a retail business at the city of Ottawa. On the 22nd of July, 1886, being then indebted to his co-defendants, Donahue & Co., merchants in Montreal, in the sum of \$2,262.60, he went to Montreal and had an interview with that firm, and explained his financial position to them, and in consequence of representations then made by him, the firm agreed to advance to him \$1,000. Dunn executed in favour of the defendant

William Donahue, who was the senior partner in the firm of Donahue & Co., and had put into the business all its capital, a chattel mortgage purporting to secure the sum of \$3,262.60. Dunn was given a cheque for \$1,000, but on the following day it was agreed that the cheque was not to be cashed, but was to be held by Dunn and the amount drawn from time to time as he required money. The \$2,262.60, the amount of the indebtedness of Dunn to Donahue & Co., was represented at this time by unmatured notes made by Dunn and discounted by Donahue & Co. at a bank. William Donahue made the usual affidavit of indebtedness, stating that Dunn was justly and truly indebted to him in the sum of \$3,262.60. The \$1,000 cheque was held by Dunn until January, 1887, and was then returned. He had however, within six weeks after the date of the mortgage, drawn upon Donahue & Co. from time to time for such sums as he required until he had drawn in all somewhat more than \$1,000. After the giving of the chattel mortgage Dunn carried on business and paid to various creditors, from time to time, more than \$4,000. He then fell ill and was unable to attend to his business, and, owing chiefly to this circumstance, he failed. At the time of his failure his indebtedness to Donahue & Co. had somewhat increased. The plaintiffs obtained judgment against him, and placed executions against him in the hands of the sheriff. While the executions were in the sheriff's hands Dunn's goods were seized under the chattel mortgage and sold. The plaintiffs then brought this action, alleging that at the time the chattel mortgage was given Dunn was in insolvent circumstances, and had made the chattel mortgage with intent to defeat, delay, and prejudice his creditors, or to give Donahue & Co. a preference over his other creditors; that, at the time the mortgage was given, he was not indebted to William Donahue in any sum whatever; that either William Donahue, or Donahue & Co., took possession of the goods and chattels of the defendant Dunn in fraud of the rights of the plaintiffs, and

Statement. sold them at an undervalue, and they asked that the chattel mortgage and all proceedings taken thereunder should be declared invalid and void; that an account should be taken of the value of the goods taken possession of by William Donahue, or Donahue & Co, and of their dealings therewith and of all the amounts realized therefrom, and of the loss and damage resulting from the proceedings; and that the defendants should be declared liable for such loss and damage, and ordered to pay the amount into Court; and also that they should be declared trustees of the moneys received by them from the sale of the goods.

The action came on for trial before BOYD, C., at Ottawa at the Autumn Sittings in 1887. A great deal of evidence was taken, and a question of fact arose as to whether or not at the time the plaintiffs' execution was placed in the sheriff's hands the goods were or were not under seizure for non-payment of taxes. This question of fact the learned Chancellor decided against the plaintiffs, holding that the goods were under seizure for taxes.

At the close of the case the learned Chancellor delivered judgment, dismissing the action with costs. He held that William Donahue had the right to take the mortgage in his own name, as he was really acting as trustee for his firm and with the assent of his partner: that the goods had been seized under the chattel mortgage before the plaintiffs' execution was placed in the sheriff's hands, or at all events that they had been seized for taxes before that time, and that the seizure by the mortgagees, who had paid off the amount due for taxes, and then taken possession of the goods, related back to the time of the seizure for taxes; and that, therefore, any objections under the Chattel Mortgage Act were cured.

The learned Chancellor also held, that the transaction was entered into in good faith, and that there was nothing improper in the agreement to hold the cheque and draw against it from time to time, but that this must be looked upon as an advance made in the *bond fide* belief that

Dunn would thereby be enabled to carry on business and pay his debts in full ; and that the chattel mortgage therefore could not be impeached under the Assignments and Preferences Act. Statement.

The plaintiffs appealed, and the appeal came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.,) on the 15th of October, 1889.

Lash, Q.C., and *D. L. McLean*, for the appellants. At the time this mortgage was taken Dunn was in insolvent circumstances, and if an independent investigation had been made by Donahue & Co., they could not have failed to discover this. They cannot say that they, in good faith, believed the advance in question would enable Dunn to carry on business and pay his debts, because they took no measures to obtain evidence upon which to found such belief. Then, as a matter of fact, no advance was made. The cheque was to be held, and the moneys used from time to time, so that this was really an agreement for future advances, and cannot be relied on under the Assignments and Preferences Act. Then as the agreement was not set out in the mortgage, the Chattel Mortgage Act makes the mortgage void. Admittedly too, Dunn was not indebted to William Donahue, and therefore the latter could not make the affidavit of indebtedness as he did, or claim that the mortgage in his favour is good. Possession was not taken before the plaintiffs' execution was placed in the sheriff's hands ; but if it had been defects of the kind in question here would not have been cured : *Parkes v. St. George*, 10 A. R. 496. The finding of fact that the goods were under seizure for taxes before the plaintiffs' execution was placed in the sheriff's hands is erroneous ; but even if it were right the goods, by virtue of that seizure, were not *in custodia legis* in such a sense as to prevent the plaintiffs' execution from taking effect.

Moss, Q.C., for the respondents. The learned Chancellor has found as facts that the transaction was entered into in good faith, and that possession was taken before the plain-

Argument.

tiffs' execution was placed in the sheriff's hands, and these findings cannot now be disturbed. It is no objection to the instrument that it is taken in favour of one partner. He was the senior partner of the firm, and the one who had advanced the capital of the firm, and was really acting as trustee for himself and his co-partner : *The Hobbs Hardware Co. v. Kitchen*, 17 O. R. 363. Whether the chattel mortgage was good or not, the goods have been sold under it, and the plaintiffs cannot follow the proceeds : *Dedrick v. Ashdown*, 15 S. C. R. 227 ; *Robertson v. Holland*, 16 Q. R. 532 ; *Stuart v. Tremain*, 3 O. R. 190 ; *Davis v. Wickson*, 1 O. R. 369.

Lash, in reply. There is a right to follow the proceeds realized at the sale. In this case the execution was in the sheriff's hands before the sale, and therefore the execution creditor had a lien on the goods before the sale. The other cases cited are distinguishable. In *Davis v. Wickson*, the money had been paid over before the action had been brought at all ; in *Stuart v. Tremain*, the plaintiff had no execution and therefore no lien ; and in *Robertson v. Holland*, not only had the plaintiff no execution, but his debt was not even due at the time the impeached transaction was entered into. Relief of the kind now asked was given in *Labatt v. Bixel*, 28 Gr. 593.

November 12th, 1889. HAGARTY C. J. O.:—

I am of opinion that the Chancellor's judgment is right and ought to be affirmed. He has most carefully and fully examined every point in the case, and I do not think anything has been shewn in argument to warrant our interference.

I fully agree with his conclusion that the taking of this mortgage, coupled with large advances then made, was, under the circumstances, a transaction not impeachable under the insolvent laws. I need not repeat his reasons for this as I adopt them as my own. A large portion of the evidence and of the judgment relates to the point whether

the goods had been actually taken possession of by the mortgagee before the execution was placed the sheriff's hands. There is a good deal of uncertainty as to the circumstances under which the possession was taken, and as to a seizure for taxes. The Chancellor, after very full consideration arrived at the opinion that the mortgagee's actual possession preceded the delivery of the writs of execution. I have fully examined the evidence as to this. Even if I entertained doubts of the correctness of the view taken I should hesitate long before interfering. But on the whole I consider that the evidence preponderates much in favour of the defendants' case.

Judgment.

HAGARTY
C.J.O.

I do not discuss the Chancellor's view as to the goods being *in custodia legis* under the tax seizure as I do not think the case calls for any decision thereon.

But I am not at all satisfied that the chattel mortgage is open to the objections taken. The objections were apparently assumed to be good, and the case rested on the taking of possession.

I can see no valid objection to the member of a firm taking a security for a debt due to his firm in his own name for the firm, or to his making the statutable affidavit as to the debt being due to him, &c., &c.: *Brodie v. Ruttan*, 16 U. C. R. 207.

Apart from the mortgage, if the original debt was sued for, all parties interested should join as plaintiffs. In any proceedings on the specialty security taken for such debt the party therein declared to be the creditor and with whom alone the covenants are made, can sue. I think this objection fails.

I cannot consider that there is anything in the point that this mortgage was to secure future advances and not in the shape required by the statute. This mortgage was to secure an existing debt and a further advance then agreed to be made, and could not, as I think, be in any way brought under the law relating to a security to cover future advances.

It is then urged that the \$1,000 advance was not made

Judgment.

HAGARTY
C.J. O.

at the time. On the giving of the mortgage, the defendants in pursuance of the agreement to advance the \$1,000 to aid the debtor, gave him a cheque for that amount, which the debtor could have cashed at any moment. Not wanting the whole of the money at once, he did not use the cheque, but drew on the defendants in Montreal as he required the money ; \$150 was drawn the same date as the mortgage. In the following January, he sent back this cheque to the defendants in Montreal. The mortgage was just then falling due, being at six months. As far as I can make out from the evidence, he had drawn to the full amount of the cheque before returning it. He was thus virtually in possession all the time, up to the time of the return of the cheque, of the means of turning it into cash.

I am of opinion that there is nothing on the subject of this cash advance which should invalidate a security like this, which has properly been found to be untainted by fraud.

The case of *Parke v. St. George*, 10 A. R. 496, is cited and relied on. Unfortunately our Court was equally divided on the point there taken, somewhat like the present case. I am afraid that neither half of the Court succeeded in convincing the other half of the unsoundness of its view.

In that case the agreement as to the alleged cash advances was merely verbal; that the debtor was to have it as he wanted it. Here the whole advance was evidenced by the mortgagee's cheque, perfectly good for the amount, and capable of being cashed at any moment, and a considerable part at once drawn for.

In the view I take of the case it is not necessary to enter into a discussion of the remaining point taken by the defendants as to the right of the plaintiffs as execution creditors to seek the relief here asked. We would hesitate long before sanctioning such a claim without very full consideration.

I cannot conclude without expressing my regret at finding forty three reasons of appeal covering seven large

printed pages, repeating the same objections with useless and wearying iteration. One fourth of the space thus occupied would have easily sufficed to state the objections with all needful distinctness.

Judgment.

HAGARTY
C.J.O.

BURTON J.A. :—

I can, I think, without receding from the opinion I expressed in *Parkes v. St. George*, 10 A. R. 496, uphold the learned Judge's finding against the objection raised in the sixth reason for appeal, upon his view of the evidence that there was an actual cash advance at the time of the execution of the mortgage. That alone distinguishes the case from those referred to in the *Parkes v. St. George* judgment in which the advances were to be made subsequently without any binding agreement in writing.

Had anything in this case turned upon the time of going into possession I fear I could hardly have arrived at the same conclusion as the learned Judge, but I think it was perfectly immaterial when the defendant took possession ; it is sufficient to say that he entered into possession and sold the goods without any interference on the part of this execution creditor.

If it be said that the creditor knew nothing about such possession being taken he may perhaps be without any remedy. The usual course would be to direct the sheriff to seize the goods, and if he fails to do his duty to bring an action against him for his default. If on the other hand he had seized, the question would probably have been disposed of on an interpleader application or in an action between him and the mortgagee.

It is said that the goods are bound by the delivery of the writ to the sheriff, which is true to this extent that, as regards the debtor himself and any person claiming under him by any subsequent assignment, the execution creditor might, speaking generally, treat such transfer as invalid and follow the property ; but the property still remains in the debtor, and so remains even after seizure by the sheriff until the execution is perfected by a sale.

Judgment.

BURTON
J.A.

Without considering the several grounds of objection to the mortgage, I wish to place my judgment on the broad ground that this action is not maintainable. I am not surprised that no precedent was cited for such an action, and think it was one of first impression.

Bills of this nature were formerly filed in Equity, where the mortgage was impeached for fraud, simply for the purpose of removing the mortgage out of the way of the plaintiff's execution. Such an action might have been brought in this case whilst the goods remained unsold, although it would strike one even then as a most unnecessary proceeding, as the same end could be obtained by directing the sheriff to act upon the execution.

I say this was the course which the execution creditor might have taken if he desired to impeach the mortgage as void under the statute of Elizabeth, or our own statute against fraudulent conveyances, but he did not do so.

In order to attack it under the Chattel Mortgage Act it was necessary for him to seize, as, against every one but a person in a position to seize under an execution, the mortgage was good. The sheriff having this execution never attempted to enforce it; the mortgagee took possession, advertised the property for sale, and sold it at public auction to a purchaser. If the plaintiffs' contention be sound any mortgagee of personal property having no knowledge that the sheriff has a subsequent writ of execution against the mortgagor of such property is liable for a conversion at the suit of such execution creditor for exercising his power of sale. In other words a person who has no property special or general in the goods can maintain an action for conversion against the person holding the legal title to the property. It requires only to be stated to furnish its own answer.

I have not for these reasons considered the objections to the mortgage under the Chattel Mortgage Act, beyond the one I have already referred to; but, even had I done so and agreed that they are untenable or cured by taking possession, I should not have been satisfied to place my

judgment upon that ground alone, and thus to give an
 apparent sanction to an experiment of this nature by
 leaving it open to doubt whether such an action would lie.

Judgment.
 BURTON
 J.A.

I think the appeal should be dismissed.

OSLER J. A. :—

Unless the plaintiffs' object in appealing was to discover on what further grounds their action was not sustainable I think they should have been satisfied with the judgment at the trial. The learned Chancellor found (1) that the defendants, the Donahues, did not know that the defendant Dunn was insolvent when he gave the chattel mortgage covering the old debt and the new and substantial advance of \$1,000; (2) that the loan was made in good faith and in the honest belief that it would enable the debtor to carry on his business. Both these findings of fact are well supported by the evidence and I agree in them.

Then it was urged that the mortgage was invalid under the Chattel Mortgage Act because it was really made, as it was said, to secure future advances and the requirements of the Act had not been complied with.

Without deciding how far the instrument was open to this objection, the Chancellor held on the evidence that the mortgagee had taken actual possession before the plaintiffs' *fi. fa.* had been delivered to the sheriff, and therefore, on the authority of *Parke v. St. George*, 10 A. R. 496, and *Whiting v. Hovey*, 12 A. R. 119, that the execution could not prevail against the mortgage, even if the latter had not been prepared in compliance with the Act. This finding of fact is more open to cavil than the other two, as Mr. Lash pointed out very well; but, nevertheless, I am of opinion that it is not so clearly wrong as to warrant us in disturbing it, more particularly as the Chancellor accepted on this point the evidence of one of the plaintiffs' own witnesses.

I do not attach much importance to this point because I think that the mortgage may well be supported

Judgment.

OSLER
J.A.

as a mortgage to secure a present actual advance, the right to which was evidenced by the cheque given to the borrower, though for his convenience the amount was left in the hands of the lender to be drawn against as it was required. But if it be assumed that it was bad under the Bills of Sale and Chattel Mortgage Act, and also that the *fi. fa.* was delivered to the sheriff before the mortgagee took possession, what is the plaintiffs' position? Their contention is, that they are entitled to the proceeds of the mortgagee's sale, and that he must account to them therefor. This contention has the merit of novelty, but is unsupported by principle or authority. The mortgage was, I will assume, void as against the writ, and the goods were bound thereby. But the general property in goods bound by or seized under an execution remains in the debtor unaltered until sale by the sheriff. The creditor acquires no property therein by virtue of his execution, and subject thereto the execution debtor, or one who stands in his position, is at liberty to dispose of them. But this does not prevent the execution creditor from following and seizing them under the writ. That is his right, as it is the purchaser's misfortune: *Giles v. Grover*, 9 Bing. 128; *Payne v. Drewe*, 4 East. 523; *Samuel v. Duke*, 3 M. & W. 622; *Ranken v. Harwood*, 10 Jur. 794; *Patterson v. McKellar*, 4 O. R. 407. It follows that the creditor has no interest in the proceeds of such a sale and can maintain no action therefor, but is left unaffected by the sale to pursue his remedy under his execution.

It is to be observed that in the present case all charges of fraud on the part of the mortgagee in taking possession and selling the goods are entirely unsupported. The goods were sold *en bloc* and remained in the county and might readily have been levied on, as appears by the deputy sheriff's evidence, if the plaintiffs had desired to contest the validity of the mortgage under the Chattel Mortgage Act, a question which is not raised by the pleadings and was probably an afterthought.

Suppose the action maintainable, though wholly unneces-

sary, for the purpose of obtaining a declaration that the mortgage was void as against the execution, the plaintiffs must, as regards the objection now in question, rely upon their status as execution creditors, and surely it is an answer to any claim for further relief or to a personal order against the mortgagee, that admitting the mortgage to be void as against the execution, the mortgagee has done no more than he had the right to do and that the goods remained subject to the execution and might have been levied thereunder. And if it was sought to enforce a remedy against the goods themselves by means of this action through the *fi. fa.*, unnecessary and wasteful as such a proceeding would be, the purchaser ought to have been made a party just as he would have been party to an interpleader if that simple proceeding had been resorted to.

Judgment.

OSLER
J. A.

MACLENNAN J. A. :—

I agree that this appeal should be dismissed.

I am unable to see that there was any valid objection to this bill of sale, either on the ground of preference or for want of compliance with the Chattel Mortgage Act.

I think the *bona fides* of the transaction is clearly made out, and that there was a large further advance of cash made to the debtor in consideration of his giving the mortgage. At the time the mortgage was signed, the mortgagee gave his cheque for the \$1,000 further advance, and he says that on the following day the defendant told him he would draw on him from time to time as he required funds, and hold the cheque in the meantime. This suggestion was acceded to, and the whole \$1,000 and more was drawn for and paid within six weeks of the giving of the mortgage. I see nothing improper in a person who is perfectly solvent, who has given his cheque for an advance upon mortgage, making the affidavit which was made here, namely, that the debtor was justly and truly indebted to him in so much money, even though the cheque had not yet been presented or paid. The parties

Judgment. chose to treat the cheque as cash, and I think it was competent to them to do so. And there was nothing improper in their afterwards arranging, for reasons of business convenience, that instead of the cheque being passed through the bank for payment, drafts should be drawn to suit the convenience of the holder.

MAOLENNAN
J.A.

Nor do I see any objection to one partner taking a security, or making an advance in his own individual name for the benefit of his firm.

The chattel mortgage then being, in my opinion, free from objection, and having been duly registered, it is not necessary, in order to support the judgment, to consider the question of possession. But I have read and considered the evidence very carefully, and I think there is abundant evidence from which the learned Chancellor could properly come to the conclusion he did, that the defendant took possession of the goods either on the 10th of March, or on the 11th, before the execution was put in the sheriff's hands. The evidence leads me to the same conclusion, but if it did not it would not be proper to overrule the learned Chancellor on the question of fact.

Although I have thus dealt with the case as if the goods were still in the hands of the mortgagee, and as if this were an action to set aside the mortgage and remove it out of the way of the plaintiffs' execution, I wish to guard myself from being supposed to decide that after a mortgagee has, as in this case, sold and delivered the goods and received the purchase money, such an action as the present will lie against him by an execution creditor who had an execution in the sheriff's hands all the time, but never made any seizure, to recover or to make him account for the purchase money.

I think the appeal should be dismissed.

Appeal dismissed with costs.

SANDFORD ET AL. V. PORTER.

Trustee—Assignee for the benefit of creditors—Duty as to keeping and furnishing accounts—Misconduct disentitling to costs—Solicitor and client—Taxation by cestui que trust of bill of solicitor employed by trustee.

It is the duty of a trustee, or other accounting party, at all times to have his accounts ready, to afford all reasonable facilities for their inspection and examination, and to give full information whenever required. As a general rule he is not obliged to prepare copies of his accounts for the parties interested, though if, for example, the *cestui que trust* or principal lives at a distance from where the trust affairs are being carried on, or in a foreign country, it would be the duty of a trustee to give all reasonable information and explanations by letter; and even, if requested, but at the expense of the *cestui que trust*, to prepare and transmit accounts and statements.

Any one *cestui que trust* may, in the discretion of the Court, obtain an order under the third party clauses of the Solicitors' Act for the taxation of a bill of costs for business connected with the trust estate of a solicitor employed by the trustee.

Where a creditor brought an action for an account against the assignee for the benefit of creditors of his debtor after demanding copies of the assignee's accounts, but without expressing any desire or making any attempt to inspect the accounts, and without waiting a reasonable time for preparation of copies, the assignee was allowed his costs as between solicitor and client out of the balance of the estate in his hands, and in case of deficiency the plaintiff was ordered personally to pay it.

The mere fact that a trustee in rendering an account to his *cestui que trust*, claims that he has in his hands a smaller sum than is found to be due by him when his accounts are taken in Court does not disentitle him to the costs of an action against him for an account.

Judgment of ROBERTSON, J., affirmed.

THIS was an appeal by the plaintiffs from the judgment Statement of ROBERTSON, J.

The action was brought by the plaintiffs, on behalf of themselves and other creditors, to administer the trusts of an assignment for the benefit of creditors made by one John Latimer on the 11th of May, 1885, to the defendant.

The statement of claim charged the defendant with misconduct in the following terms :

" 6. The defendant, neglecting his duty in that behalf, did not proceed with due dispatch to wind up the said estate, by selling, collecting, and converting the same into money, and distributing the proceeds thereof among the plaintiffs and other creditors of the said Latimer, as it was his duty to have done, but on the contrary, although more than a year elapsed prior to the commencement of this action, the

Statement.

defendant did not wind up the said estate in the manner aforesaid, nor did he render any account to the plaintiffs and other creditors of the said Latimer of his dealings therewith, although an account was frequently demanded, but the defendant has wasted and dissipated the said estate, and he now claims that there is only some seventy-six dollars available for distribution among the creditors, which sum the defendant still improperly retains in his hands."

The defence after stating that the assignment contained provision for payment out of the trust estate of all the trustee's costs, charges, and expenses, of the deed of assignment, and in respect of the management and trusts of the estate, denied all charges of neglect of duty and improper conduct alleged against him, declared his readiness and willingness at all times to account, and submitted to account as he might be directed by the Court.

Upon the action coming on for trial a judgment was pronounced by consent directing the usual accounts and inquiries in such cases, with a provision that the referee was at the request of either party to report specially upon such facts as might appear before him on the reference. Further directions and costs were reserved.

The referee reported that the estate had all been realized and amounted to \$2,092.78, and that the defendant had properly disbursed and was entitled to be credited with \$1,683.91, leaving a balance in his hands of \$408.87, and that the amount of claims proved was \$11,437.67.

The special findings of the referee in his report were in substance as follows :

The assignment was made on the 11th of May, 1885, and comprised the goods in a village store of the estimated value of \$5,000, and certain book debts. On the 15th of June following, all the stock except a portion of the value of \$177, was replevied by the sheriff out of the defendant's hands, who contested the replevin action in good faith, but unsuccessfully, and incurred a large bill of costs in doing so. The persons who replevied

the goods were merchants from whom the debtor had obtained them, as they alleged, by misrepresentation and fraud, and to whom he had given certain promissory notes as collateral security for payment. As the result of the replevin actions these notes were recovered by the assignee, and being realized produced \$1,430, the largest item of the available assets of the estate.

The replevin actions were only concluded on the 1st of April, 1886; and on the 15th of May, the same solicitors who had acted for the plaintiffs in replevin, wrote a letter to the defendant demanding an account of the trust estate, representing that it was required on behalf of a number of creditors. On the 17th of May the defendant's solicitor requested the names of the creditors for whom the account was required; and on the 18th the names were furnished. On the 25th of May the defendant's solicitor wrote, saying that the defendant was preparing a statement, and that it would be sent in a few days. On the 2nd of June the defendant's solicitor wrote again that the costs due by the estate to him were being revised, and that the statement could not be sent till that was completed, which would be the same week. On the same day this action was commenced, and the promised statement was delivered on the 7th of June, shewing a small balance in the defendant's hands of \$76.81.

It seems that the defendant's solicitor had delivered to the defendant his bills of costs of the litigation, and otherwise in connection with the business of the estate, amounting to \$2,104, but he had consented to reduce the amount to \$1,565. Another solicitor, in good practice, had been requested to go over the bills and to say whether in his opinion the reduced sum was fair and proper, and he had done so, and had given his opinion that it was, and this was the revision which was going on on the 2nd of June, when the letter of that date was written.

The statement rendered by the defendant on the 7th of June was based upon this sum of \$1,565 being the amount due to the solicitor for his bill of costs, and it was that

Statement. same statement which was afterwards brought in by the defendant as his account on the reference in this action.

The result of the examination of the defendant's account before the referee was that he disallowed three items; expenses to Priceville collecting accounts, \$8; attending at Priceville eight days collecting accounts, \$24, and witness fees in *Knox & Brown v. Porter*, \$6, a total of \$38. It did not appear on what grounds these three items were disallowed, but it was not contended that they were claimed fraudulently, or that it was misconduct on the part of the defendant to seek to have them allowed.

Besides disallowing the three items just mentioned the referee reduced the solicitor's bill of costs from \$1565 to \$1272.84, which, he said in his report, he would not have done had he not after a great deal of hesitation and doubt come to the conclusion that the bills were not paid bills. In all other respects the defendant's account was found to be correct.

Upon this report the case came before ROBERTSON, J., upon further directions, and he gave the defendant his costs as between solicitor and client out of the balance of the estate in his hands, and in case of deficiency he ordered the plaintiffs personally to pay it.

The plaintiffs appealed, and the appeal came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 22nd of October, 1889. A preliminary objection that no appeal lay was taken by the respondent, and the Court directed this objection and the appeal on the merits to be argued together.

C. J. Holman, and *Washington*, for the appellants. There is clearly the right to appeal. This is not an attempt to appeal upon a question of the discretionary disposition of costs, but upon two questions of principle: first, that the defendant has been guilty of such misconduct that he is not entitled to costs at all; and, second, that at all events the plaintiffs having been given the account asked for, have so far succeeded in the action that they cannot be

ordered to pay costs : *Mitchell v. Vandusen*, 14 A.R. 517; *Argument*.
Wills v. Carman, 14 A.R. 656 ; *Re Foster v. Great Western R.W. Co.*, 8 Q.B.D. 25 ; *Harris v. Petherick*, 4 Q.B.D. 611 ; *Church v. Fuller*, 3 O.R. 417. The defendant has been guilty of misconduct disentitling him to costs, inasmuch as he has attempted to support items in his accounts not properly chargeable, and has not admitted as large a balance as he has been charged with : *Beatty v. O'Connor*, 5 O.R. 747 ; *Boulton v. Rowland*, 4 O.R. 720 ; *Jones v. Curling*, 13 Q.B.D. 262. The defendant should have had the solicitor's costs taxed before rendering his account, and cannot now complain when he has been found to have improperly retained in his hands more than the solicitor was allowed on taxation. The plaintiffs were clearly entitled to the account demanded : *Springett v. Dashwood*, 2 Giff. 521 ; *Kemp v. Burn*, 4 Giff. 348 ; *Hardwicke v. Vernon*, 14 Ves. at p. 510 ; *Anon.*, 4 Madd. 273 ; *Randall v. Burrowes*, 11 Gr. 364.

M. G. Cameron, and *W. M. Douglas*, for the respondent. The defendant succeeded in the action, and no appeal lies as to the disposition of the costs. The mere fact that the defendant has been found indebted to the estate in a larger amount than he admitted, is no reason for depriving him of his costs : *Turner v. Hancock*, 20 Ch. D. 303. The only reduction of importance was in the amount charged for costs, and the defendant acted in good faith in regard to these costs, and submitted the bill to an independent solicitor for revision. The plaintiffs made no objections to any of the items, and did not tax the solicitor's bill as they might have done, and cannot now complain : R. S. O. ch. 147, sec. 42 ; *In re A. and B.*, 6 P. R. 68 ; *Re Crerar and Muir*, 8 P. R. 56 ; *Re Macdonald, Macdonald and Marsh*, 8 P. R. 88. Here the assignment itself expressly provides for payment of the defendant's costs ; but apart from that the trustee is entitled to costs under the general rule of law, unless there is actual culpable misconduct : *Edenborough v. Archbishop of Canterbury*, 2 Russ. at p. 112 ; *In re Love, Hill v. Spurgeon*, 29 Ch. D. 348 ; *Stott v. Milne*, 25

Argument.

Ch. D. 710; *In re Evans, Welch v. Channell*, 26 Ch. D. 58; *Stanier v. Evans*, 34 Ch. D. 470; *Cotterell v. Stratton*, L. R. 8 Ch. 295; *In re Chennell, Jones v. Chennell*, 8 Ch. D. 492; *In re Watts, Smith v. Watts*, 22 Ch. D. 5; *In re Knight*, 22 Ch. D. 384. The plaintiffs had no right to be furnished with copies of the defendant's accounts, but if they had, they did not allow reasonable time for their preparation, and might rightly have been ordered to pay the whole costs of the unnecessary litigation: *Re Woodhall, Garbutt v. Hewson*, 2 O. R. 456. The plaintiffs have made charges of fraud, which have not been sustained, and should therefore pay costs.

C. J. Holman, in reply. The plaintiffs could not tax the bill. A reasonable time was allowed for preparation of the accounts, and the defendant was charged with more than he admitted, and should not have costs: *Boynston v. Richardson*, 31 Beav. 340; *Sandys v. Watson*, 2 Atk. 80; *In re Radclyffe, Pearce v. Radclyffe*, 50 L. J. Ch. 317.

November 12th, 1889. The judgment of the Court was delivered by

MACLENNAN J.A. :—

The first question we have to consider is, whether there was here any misconduct or wilful neglect of duty by the defendant.

No attempt was made, so far as we can see, to establish the charge made in the statement of claim that the defendant had wasted and dissipated the estate. But it was said that his neglect to account to the plaintiff after demand and the erroneous statement of the balance in his hands amounted to misconduct.

I do not think there was anything here that could properly be called misconduct. The litigation in which the trustee was involved ended about the 1st of April. As the result of this litigation he obtained for the estate certain promissory notes which yielded a sum of \$1430, which

constituted the greatest part of the assets which came to his hands. It does not appear how soon after the 1st of April this sum was recovered. On the 15th of May the plaintiffs' solicitors demanded an account for some clients, not saying for whom, and on the 18th they furnished the names. On the 25th they were told that a statement was being prepared and that it would be furnished in a few days; and again on the 2nd of June they were told that the costs due by the estate were being revised, without which the statement could not be sent, but that it would be sent in the same week. In spite of this information the plaintiffs commenced their action on the same day, the 2nd of June. The statement was delivered on the 7th. There was here certainly no culpable neglect by the trustee, no neglect at all that I can see. The plaintiffs' solicitors knew very well all about the litigation in which the trustee had been involved, for they had been the solicitors in the replevin action. They knew the principal item of the estate had only lately been recovered, and that there must be a large bill of costs to be adjusted. When therefore they were told that a statement was being prepared and would be ready in a few days, and again that the costs were being revised, and that they would have the statement before the end of the week, and when as a matter of fact the statement was so delivered, I think there is not the slightest ground for saying that there was any culpable neglect by the trustee.

Judgment.

MACLENNAN.
J.A.

It seems to have been thought by the solicitors of the plaintiffs that it was the duty of a trustee, upon demand for an account, to lay aside everything else, and to sit down and make out an account for them, at the peril of a suit for an account and costs. But the law is not so unreasonable.

The duty of a trustee or other accounting party is to have his accounts always ready, to afford all reasonable facilities for inspection and examination, and to give full information whenever required; but as a general rule he is not obliged to prepare copies of his accounts for the

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J.A.

parties interested. Cases may be imagined where it would be reasonable to require, and when it might be the duty of the trustee to furnish, statements of account, as, for example, when the *cestui que trust* or the principal lives at a distance from where the trust affairs are being carried on, or in a foreign country. In such a case it would be the duty of a trustee to give all reasonable information and explanations by letter; and even, if requested, but of course at the expense of the *cestui que trust*, to prepare and transmit accounts and statements. But every case must depend on its own circumstances, and must be governed by reason and common sense. Every one would see how unreasonable and absurd it would be to say it was the duty of an executor of a large estate which had been going on for a number of years, to furnish, on demand, to a person interested, it might be in only a small share of the residue, a copy of the estate accounts. In such a case the accounts might fill one or more large ledgers, and other usual books of account. In such a case the legatee is interested in, and entitled to see and examine, all the entries from first to last. He may examine them and take copies or extracts and he is entitled to reasonable explanation from the trustee of whatever requires explanation, but he cannot require the trustee to make copies and extracts for him. Mr. Holman cited *Kemp v. Burn*, 4 Giff. 348, as an authority for the proposition, that a trustee was bound, on demand, to prepare and deliver accounts to his *cestui que trust*, and that if he did not do so, he would be made to pay the costs of a suit for an account. But that was a case in which the trustee refused to allow the solicitor for the *cestui que trust* to see the accounts, because he thought he wanted them for some ulterior object of his own and not in the interest of his client, and it was held he was not justified in such refusal.

The true rule, as I understand it, is laid down by Mr. Lewin, *Law of Trusts*, 8th ed., p. 691, where he says: "The *cestui que trust* has a right to call upon the trustee for accurate information as to the state of the trust. Thus in a

trust for sale and payment of debts, the party entitled subject to the trust may say to the trustees, What estates have you sold? What is the amount of the moneys raised? What debts have been paid? etc. It is, therefore, the bounden duty of the trustee to keep clear and distinct accounts of the property he administers and he exposes himself to great risks by the omission. It is the first duty of an accounting party * * to be constantly ready with his accounts."

Judgment
MAOLENNAN
J.A.

No doubt expressions are used in some of the cases indicating that it is a trustee's duty to render accounts. But I have found no case in which it was distinctly laid down, that the rendering of an account meant the preparation by the trustee of a copy of the trust account, and its delivery to the *cestui que trust*. There is, however, clear authority the other way.

In *Ottley v. Gilby*, 8 Beav. 602, Lord Langdale distinctly decided that a legatee was not entitled to require a copy of the accounts at the expense of the estate. In that case the legatee's solicitors wrote to the executors after some previous correspondence saying that unless they received within a fortnight such an account as a legatee in the situation of the plaintiff had a right to require, they would place a bill on the file. A reply, but no account, was sent, and one year afterwards a bill was filed. Afterwards the defendants offered to produce the accounts and evidences for inspection, but this was refused unless the defendants would undertake to pay the costs. The executors claimed a balance of £204 to be due to them; but on the accounts being taken, they were found £95 in debt.

The Master of the Rolls said he regretted to have a case of such wanton, unnecessary, and improper litigation brought before him. He then proceeded thus:

"A legatee has a clear right to have a satisfactory explanation of the state of the testator's assets, and an inspection of the accounts, but he had no right to require a copy of the accounts at the expense of the estate. Here

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MACLENNAN
J.A.

no inspection was offered before the institution of the suit, but it was proposed afterwards. I think that the refusal of the plaintiff's solicitors to inspect them unless their costs were paid was wrong, as such an examination could not have prejudiced the plaintiff's claim, and the information furnished by the accounts, to which they voluntarily shut their eyes, might have prevented further litigation."

In *Smith v. Roe*, 11 Gr. 311, the late Chief Justice Spragge, than whom no Judge was better qualified to speak on this subject, expressed the same view as to the duty of a trustee to deliver an account. In that case the solicitor of the legatees of the estate, eight and a-half weeks before bill filed, wrote to the executors as follows: "As executors, you are aware that it is your duty to have your accounts always ready, but if they are not in such condition as to enable you to supply us with the information required immediately, please communicate to us the time you will need for the purpose." The learned Chief Justice says: "Partly through accident no answer or even acknowledgment was sent to this until the day after the bill was filed. But it was not then too late. If the executors had then made a proposition which the plaintiffs ought to have accepted, and did not accept, the Court would certainly give no costs against the executors. It is said that too much was asked by this letter, that executors are not bound to render accounts but only to have them ready for inspection. I agree that they are not bound to do more; but it was information that was asked for, and the answer should have been that the accounts were ready for inspection, or if not, a day should have been named for their being so."

In the present case the defendant did not object to furnish a statement, but he required, and he was entitled to, a reasonable time to prepare it. When his solicitor's bill was prepared, it was a perfectly proper thing to get it examined by an independent solicitor, and it is evident that was being done when the action was commenced. I think that so far from the defendant having been guilty

of misconduct in neglecting to render an account, his conduct was perfectly reasonable and proper, and that the fault was altogether on the side of the plaintiffs. If the plaintiffs did not choose to wait a few days for a statement they might have asked for an inspection of the accounts and of the bill of costs, and there is no reason whatever to suppose that this would have been denied them.

Judgment.

MAULENNAN
J.A.

The other ground of misconduct which was urged relates to the items which were disallowed by the referee, namely, the \$38, and what was taxed off the solicitor's bill.

As to the \$38, it may be that when pointed out and objected to the three items composing these sums would at once have been abandoned by the defendant. But if not these items alone would have afforded no justification whatever for bringing an action.

As to the solicitor's bill, it cannot be said that the fact that it was reduced on taxation was misconduct on the part of the trustee. There is nothing to shew he desired to pay his solicitor an excessive or improper bill. On the contrary he took the very reasonable and proper course of getting an independent solicitor to go over it, and to give his opinion upon it. If the plaintiffs' solicitors thought when they came to examine it, that it was excessive, or contained improper charges, their obvious and only proper course was to have it taxed. In Mr. Lewin's Law of Trusts, 8th ed., p. 642, the law is stated to be that, under the third party clauses of the Solicitors' Act, *cestuis que trust* may, at the discretion of the Court, obtain an order to tax the bill of the solicitor employed by the trustee, citing *Re Drake*, 22 Beav. 438; *Re Dawson* 28 Beav. 605; and other cases which I think fully bear out the statement.

It is not to be assumed that if the plaintiffs' solicitors had requested the defendant to have his solicitor's bill taxed, any objection would have been made either by the client or the solicitor, but if they had objected, the plaintiffs could themselves have obtained an order for the purpose,

Judgment. although they were only one of a number of *cestuis que*
MACLENNAN *trust: Re Press*, 35 Beav. 34.

J. A.

I think, therefore, that the defendant was not guilty of any conduct to justify the action being brought against him, and that like the case above referred to before Lord Langdale, the action was perfectly unnecessary and useless.

Now the case being such as I have described, a useless and unnecessary action brought against a trustee found guilty of no culpable neglect or improper conduct in the discharge of his duty, what is the rule as to the costs of the trustee?

In *Turner v. Hancock*, 20 Ch. D. at p. 305, the late Master of the Rolls quotes with approval from Lord Selborne's judgment in *Cotterell v. Stratton*, L. R. 8 Ch. at p. 302, as follows:—

"The contract between the author of a trust and his trustees entitles the trustees, as between themselves and their *cestuis que trust*, to receive out of the trust estate all their proper costs incident to the execution of the trust. These rights resting substantially on contract can only be lost or curtailed by such inequitable conduct on the part of a mortgagee or trustee as may amount to a violation or culpable neglect of his duty under the contract."

And he adds:

"It is not the course of the Court in modern times to discourage persons from becoming trustees by inflicting costs upon them if they have done their duty, or even if they have committed an innocent breach of trust. The earlier cases had the effect of frightening wise and honest people from undertaking trusts, and there was a danger of trusts falling into the hands of unscrupulous persons who might undertake them for the sake of getting something by them."

And in that case the Court of Appeal, reversing the judgment of Bacon, V. C., gave the trustee his costs out of the estate, although he had denied that he was indebted to the estate, and although when his accounts were taken

a balance of £62 was found against him. It is clear then, in my opinion, that the learned Judge was right in giving the defendant his costs out of the balance of the estate in his hands.

Judgment.

MACLENNAN
J. A.

It was further contended, however, that even if it were right to give the defendant his costs, as between solicitor and client, out of the estate, it was wrong to make the plaintiffs pay the possible deficiency, and that there was no jurisdiction to do so.

The rule in such cases, as laid down by Mr. Lewin, *Law of Trusts*, 8th ed., p. 986, is as follows: "The general rule is, that a trustee shall have his costs of suit awarded to him at the hearing, either out of the trust estate, or to be paid by his *cestui que trust*. And if there be a fund under the control of the Court he will have his costs as between solicitor and client. And if there be no fund, still, if the *cestuis que trust* choose to bring the trustees before the Court for obtaining its directions as to the rights of the parties, or the mode of administration, and the trustees are free from blame, the trustees are entitled to their costs as between solicitor and client as against the *cestuis que trust* personally."

This action is one which under the former practice would have been the subject of a suit in Chancery, and the costs would have been dealt with according to the discretion of the Court.

Under sections 20, 21, 22, and 23 of the Judicature Act, R. S. O. ch. 44, the High Court has the same jurisdiction now which the Court of Chancery had before in such cases, and there can be no doubt the Court always had the power to make the plaintiff pay the costs, even as between solicitor and client in such a case.

This subject has lately undergone full discussion in the Court of Appeal in England in the case of *Andrews v. Barnes*, 39 Ch. D. 133, in which it was held that the Court of Chancery formerly had, and that the High Court now has in matters of equitable jurisdiction, a general discretionary power to give costs as between solicitor and client.

Judgment.

MACLENNAN
J.A.

In this case the learned Judge has thought fit in his discretion to give against the plaintiffs any deficiency of the defendant's costs as between solicitor and client which may arise after the fund in his hands is exhausted, and I think we cannot interfere with what he has done.

The appeal should be dismissed, with costs.

Appeal dismissed with costs.

END OF VOLUME XVI., A. R.

A DIGEST
OF
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BEING DECISIONS IN THE
COURT OF APPEAL FOR ONTARIO.

ACCEPTANCE.

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ALLOTMENT.

See COMPANY, 2, 4, 5.

AMENDMENT.

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APPEAL.

County Court — Action tried with jury—General verdict—R. S. O. ch. 47, secs. 41, 42 — Practice—Depriving successful party of costs.]—When a case in the County Court has been tried with a jury the only appeal given by R. S. O. ch. 47, sec. 41, direct to the Court of Appeal from the judgment at the trial is when such judgment is directed to be entered upon special findings of the jury, and it is complained of as being wrong in law upon such findings. Any other appeal raising an objection to the conduct of the proceedings at the trial on a motion for a nonsuit or the reception or rejection of evidence or the charge to the jury must be brought from the decision of the Judge upon a subsequent motion for a new trial.

The general language of section 42 does not apply when the case is one coming within section 41.

The jury found a verdict for the plaintiff on his claim for \$200, and for the defendants on their counter-claim for \$100, and stated that they wished the plaintiff to have full costs and the defendant to have no costs, and the Judge gave effect to the expression of their wishes as to costs.

Held, that the recommendation of the jury did not constitute good cause for depriving the defendants of the costs of the counter-claim. Weaver v. Sawyer and Company, 422.

APPROACH TO STATION.

See NEGLIGENCE, 1.

ARBITRATION AND AWARD.

Motion to set aside award—Admissions of arbitrator as to the grounds upon which he proceeded—Draft award setting out grounds—Improper reception of evidence.]—Held, affirming the judgment of ARMOUR, C. J., that where the action and all matters of account and counter-claim therein, and all matters in difference between the parties were by consent referred to the arbitration and final end and determination of a named person and no provision was made for an appeal, his award, valid on its face, could not be attacked because of alleged improper reception of evidence by him, or because of alleged errors in the principle of computation upon which he proceeded; the evidence having been received with reference to matters in difference between the parties and within the jurisdiction of the arbitrator, and the principle of computation being disclosed in a draft award, not delivered with, nor forming any part of the formal award, and in conversations, after the making of the award, between the arbitrator and one of the solicitors for the attacking party, the arbitrator himself not admitting that he had made any mistake, and not assisting the party complaining of the award to apply to the Court to set it right.

East and West India Dock Co. v. Kirk, 12 App. Cas. 738, considered. Lemay v. McRae et al., 348.

See MUNICIPAL CORPORATIONS, 1, 6.

ASCERTAINED AMOUNT.

See COUNTY COURT.

ASSESSMENT AND TAXES.

Fiscal year—By-law extending time for payment of taxes—Tax sale—Replevin—Sale of safe held under lien agreement—R. S. O. ch. 184 sec. 364. —R. S. O. ch. 193, secs. 53, 122, 123, and 124.]—In December, 1886, the plaintiffs sold to one H., who was a tenant of the defendant G. of certain premises in the city of Stratford, a safe under the ordinary lien agreement. Under the lease H. was to pay taxes. In October, 1887, after the first instalment of purchase money had been paid, H. surrendered his lease to G., who took over the chattels of H. (including the safe), at a valuation, and assumed payment of the proportion up to that time of the taxes for 1887. G. then leased the premisses to the defendant P. and sold to him the chattels (including the safe.)

The defendant J. was the collector of taxes for the city of Stratford, and the roll for 1887 was delivered to him on the 26th October, 1887.

It was provided by by-laws of the City that all taxes and assessments should be paid by the 31st December in each year, and that five per centum should be added for non-payment and collected as if the same had originally been imposed and formed part of such unpaid tax or assessment.

On the 2nd November, 1887, J. served on P. a tax notice shewing the amount of taxes and requiring payment of these taxes on or before the 31st December "according to city by-law; after that date five cents on the dollar will be added to the above amount."

On the 9th March, 1888, the plaintiffs demanded from the defendants P. and G. possession of the safe, but possession was refused, and on the same day the defendant J., acting under the instructions of the defendant G., issued his warrant to the defendant T. to distrain, and the safe was seized on that day, and sold on the 15th March to the defendant G. whose object in buying was to protect P.

No demand for payment of the taxes other than the demand served on the 2nd November, 1887, had been made.

Held, per BURTON and MACLENNAN, JJ. A., that the sale (upon the evidence) was not made in good faith, and was void.

Held, also, per OSLER, J.A., that as to the collector and bailiff, though not as to the other defendants, the sale was made in good faith and would have protected them if otherwise valid, but that it was bad as to all the defendants on the ground that no demand had been made by the collector after the time fixed by the by-law for payment of the taxes.

Section 364 of the Municipal Act, R. S. O., ch. 184, relates to the period of the fiscal year for which the taxes are imposed and levied, and not to the extension of the time for payment of the yearly taxes which is done by by-law passed under the authority of section 53 of the Assessment Act, R. S. O. ch. 193.

Chamberlain v. Turner, 31 C. P. 460, and *Carson v. Veitch*, 9 O. R. 706, considered.

Judgment of the County Court of the County of Perth affirmed. *Goldie v. Johns*, 129.

See MUNICIPAL CORPORATIONS, 2, 6.

ASSIGNMENTS AND PREFERENCES.

Assignment for the benefit of creditors—Costs of creditor having execution in sheriff's hands—R. S. O. ch. 124, sec. 9.—*Held*, [BURTON, J. A., dissenting], affirming the judgment of ARMOUR, C. J., that under R. S. O., ch. 124, sec 9, the costs for which the execution creditor has a lien are the costs not of the execution only but all the usual costs which could be recovered from the debtor under an execution. *Ryan v. Clarkson*, 311.

See BANKRUPTCY AND INSOLVENCY—BILLS OF SALE AND CHATTEL MORTGAGES—LANDLORD AND TENANT, 1—MORTGAGOR—REVENUE—TRUSTS AND TRUSTEES—VOLUNTARY CONVEYANCE.

BANKRUPTCY AND INSOLVENCY.

Trusts and trustees—Assignment for the benefit of creditors—Mortgage to secure moneys used by trustee in breach of trust—Trust estate not a creditor—Intent to prefer—Having the effect of preferring—R. S. O. ch. 124, sec. 2.—The defendant W., who was executor under the will of one J., made in favour of himself and the defendant H., who was his co-executor under the will, a mortgage to secure the repayment of trust moneys improperly used by W., in breach of trust. W. was at the time this mortgage was given, and continued to be, in insolvent circumstances, but had made no assignment for the benefit of his creditors. The plaintiffs, execution creditors of W., attacked the mortgage.

Held, that no assignment having been made, an execution creditor might attack the security, and take advantage of section 2 of the Act, R. S. O. ch. 124.

Held, also, that neither H., nor H. and W. as executors were, in the strict sense of the word, creditors of W., and that the mortgage therefore could not be set aside as having been given with intent to prefer, or as having the effect of preferring, one creditor to another.

Held, also, (OSLER, J. A., dissenting,) that the words, "or which has such effect," in section 2 R. S. O. ch. 124, relate only to the immediately preceding clause dealing with the preference of one creditor over others, and this mortgage not being made with intent to defeat, delay, or prejudice creditors, could not be set aside on the ground that it had the effect of defeating, delaying, or prejudicing them.

Per OSLER, J. A.—These words apply to the whole of the antecedent part of the section, embracing as well conveyances made with intent to defeat, delay, or prejudice, as those made with intent to prefer only, and any conveyance or transfer by an insolvent, (with the exceptions, specially mentioned in section 3), which has the effect of, defeating, delaying, prejudicing, or preferring creditors, whatever may have been the intent with which it is made, is within the statute.

Judgment of MACMAHON, J., affirmed on other grounds.—*Molsons Bank v. Halter*, 323.

BANKS AND BANKING.

See COMPANY, 1, 2.

**BILLS OF EXCHANGE AND
PROMISSORY NOTES.****1. *Cheque—Presentment—Waiver of presentment and notice of dishonour—Accord and satisfaction.***

—On the 26th of June, P. and M. exchanged cheques for the accommodation of P., the cheque of P. being drawn on a bank in Hamilton, and the cheque of M. being drawn on private bankers in Toronto. It was agreed that the former cheque should not be presented before the 1st of July, and it was alleged by P., but denied by M., that a similar restriction applied to the latter cheque. The private bankers suspended payment and closed their doors about noon on the 27th of June, having a large balance in their hands at the credit of M., who, on that day, served a writ on them in an action to recover this balance (the amount of the cheque being included). His cheque was never presented for payment, nor was any notice of dishonour given. The cheque of P. was presented and paid.

Held, that even assuming there was no agreement to postpone presentment, P. had the whole of the 27th of June to present M.'s cheque, and therefore had not been guilty of laches up to the time of the suspension of the bankers; that although the suspension would not in itself excuse non-presentment and want of notice of dishonour before action, yet this event and the bringing of the action by M., which operated as a countermand of payment, would do so.

Per OSLER, J.A. The defendant having, by his pleading and throughout the case, rested his defence solely on the non-presentment of the cheque before the suspension of the bankers, must at this stage of

the cause be treated as having waived presentment and notice of dishonour after that time, the evidence showing that he had no reason to expect that his cheque would then be honoured, and that he could have sustained no loss in consequence of such non-presentment.

Some time after the suspension of the private bankers, and after some negotiations between P. and M. as to the payment of M.'s cheque, P. signed a memorandum drawn up by M. in the following form: "Please take judgment when you think best against F. and L. (the private bankers), to include the amount of your cheque for \$575 to me, upon the understanding that the same is to be paid me out of the first proceeds of such judgment. You are to exercise your best discretion in the matter."

M. then went on with his action, and entered judgment, but nothing was recovered.

Held, that this memorandum did not necessarily import an abandonment of P.'s claim upon the cheque, and the acceptance of a new and substituted mode of obtaining payment, and did not operate as an accord and satisfaction.

Decision of the Queen's Bench Division affirmed. *Blackley v. McCabe*, 295.

2. *Notice of dishonour—To what place to be addressed—Place designated under signature — R. S. C. ch. 123, sec. 5.*—Where it is intended to designate under the provisions of R. S. C. ch. 123, sec. 5, a place to which notice of dishonour may be sent other than the place at which the bill or note is dated, it is sufficient if the name of a place is written under or beneath the signature of the party. "Under his signature" does not mean that the

name of the place must be written by the party's own hand ; it may be written by another person if that other person had in any manner any kind of authority from the party to write it.

Where a place has been so designated by any party, the holder of the instrument may send notice to that place, even if he has reason to think or even knows that such place is not the party's place of residence or place of business.

Cosgrave v. Boyle, 6 S. C. R. 165, considered and applied.

Judgment of the First Division Court of Wentworth affirmed. *Hay v. Burke*, 463.

BILL OF LADING.

See *Canadian Locomotive Company v. Copeland*, 322.

BILLS OF SALE AND CHATTEL MORTGAGES.

Assignments and preferences — Present advance — Execution creditor following proceeds when mortgaged goods sold — Security taken by partner in his own name to secure partnership debt — Affidavit of bona fides — Debt represented by paper under discount.] — A mercantile firm to whom a customer was indebted on unmatured paper, part of which was under discount at a bank, in good faith and in the honest belief that it would enable him to carry on his business, agreed to make a fresh advance to him of about a third of his indebtedness to them, and took from him to one of the firm a chattel mortgage for the whole amount, the

mortgagee making the usual affidavit of *bona fides*. When the mortgage was executed a cheque for the fresh advance was given to the customer who, pursuant to a subsequent arrangement, did not use it, but afterwards drew at intervals on the firm until the amount of the cheque was paid, when it was returned.

Held, [BURTON, J. A., doubting, but expressing no opinion on this point], affirming the finding of fact at the trial, that even if the mortgage was defective under the Chattel Mortgage Act, yet the plaintiffs, execution creditors, were not entitled to prevail because the mortgagee had taken actual possession of the goods before the delivery of the writ to the sheriff.

Held, also, that the mortgage was valid : (1) Under the Chattel Mortgage Act : though the debt was due to the partnership, one partner could properly take the mortgage and make the affidavit of *bona fides*, and it was a mortgage to secure a present actual advance, and not future advances so as to come within section 6 of the Act. (2.) Under the Assignments and Preferences Act ; because the advance was made in the *bona fide* belief that the mortgagor would thereby be enabled to continue his business and pay his debts in full.

Per BURTON and OSLER, JJ.A. Even if the mortgage had been invalid and the mortgagee had taken possession and sold after the delivery of the writ an action for an account of the proceeds would not lie against him at the suit of the execution creditor. His only remedy would be to follow the goods and seize them under his execution.

Judgment of BOYD, C., affirmed. *Ross et al. v. Dunn et al.*, 552.

BREACH OF PROMISE OF MARRIAGE.

See HUSBAND AND WIFE, 2.

BREACH OF TRUST.

See In re Bolt and Iron Co., 397.

BY-LAW.

See ASSESSMENT AND TAXES — MUNICIPAL CORPORATIONS, 1, 2, 3, 4 — PUBLIC SCHOOLS — RAILWAYS, 2.

CASES.

Adams v. The City of Toronto, 12 O. R. 243, discussed.]—*See* MUNICIPAL CORPORATIONS, 1.

Atkinson v. Baker, 14 A. R. 409, considered.]—*See* LANDLORD AND TENANT, 1.

Bickford v. The Town of Chatham, 14 A. R. 32, 16 S. C. R. 235, considered.]—*See* RAILWAYS, 2.

Carson v. Veitch, 9 O. R. 706, considered.]—*See* ASSESSMENT AND TAXES.

Chamberlain v. Turner, 31 C. P. 460, considered.]—*See* ASSESSMENT AND TAXES.

Concha v. Concha, 11 App. Cas. 541, considered and followed.]—*See* RAILWAYS, 2.

Cosgrave v. Boyle, 6 S. O. R. 165, considered and applied.]—*See* BILLS OF EXCHANGE, 2.

Davis v. McKinnon, 31 U. C. R. 564, observed upon.]—*See* LANDLORD AND TENANT, 2.

East and West India Dock Co. v. Kirk, 12 App. Cas. 738, considered.]—*See* ARBITRATION AND AWARD.

Geauyeau v. Great Western R. W. Co., 3 A. R. 412, considered.]—*See* RAILWAYS, 2.

Griffith v. Brown, 21 C. P. 12, considered.]—*See* LANDLORD AND TENANT, 1.

Hopkinson v. Rolt, 9 H. L. C. 514, considered and applied.]—*See* VOLUNTARY CONVEYANCE, 2.

Jessup v. Grand Trunk R. W. Co., 7 A. R. 123, considered.]—*See* RAILWAYS, 2.

Manzoni v. Douglas, 6 Q. B. D. 145, discussed.]—*See* NEGLIGENCE, 2.

McGarvey v. The Town of Strathroy, 10 A. R. 636, discussed.]—*See* MUNICIPAL CORPORATIONS, 1.

In re The Queen City Refining Co., 10 O. R. 264, explained.]—*See* COMPANY, 4.

Re Squier, 46 U. C. R. 474, considered.]—*See* MUNICIPAL CORPORATIONS, 5.

Tench v. Great Western R. W. Co., 33 U. C. R. 8, distinguished.]—*See* COMPANY, 3.

Trust and Loan Company v. Lawrason, 6 A. R. 286, 10 S. C. R. 679, distinguished.]—*See* MORTGAGE.

Van Egmond v. The Town of Seaford, 6 O. R. 610, distinguished.]—*See* MUNICIPAL CORPORATIONS, 1.

Wallace v. Great Western R. W. Co., 3 A. R. 44, distinguished.]—*See* RAILWAYS, 2.

Wyld v. Clarkson, 12 O. R. 589, explained.] — See LANDLORD AND TENANT, 1.

Yeomans v. The County of Wellington, 4 A. R. 301, followed.] — See MUNICIPAL CORPORATIONS, 1.

OERTIORARI.

See MALICIOUS ARREST.

CHEQUE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

COMPANY.

1. *Dominion Winding-up Act—Constitutionality—Application of Act to Provincial corporation—Power of Court to direct reference to Master.*]—Held, affirming the decision of BOYD, C., that the Act, 45 Vic. ch. 22, (D.) now R. S. C. ch. 129, is *intra vires* the Dominion Parliament, and applies to an insurance company incorporated by the Provincial Legislature.

Held, also, BURTON, J. A., dissenting, that a winding-up order under this Act having been made, and the liquidator appointed, by the Judge, the subsequent proceedings might properly be referred to the Master. *In the Matter of Clarke and the Union Fire Ins. Co.*, 161.

2. *Banks and banking—Winding-up Act—Subscription for shares—Transfer of shares—Shareholders within one month of suspension—R. S. C. ch. 120, secs. 20, 29, 70, 77.*]—One B. subscribed for twenty-five shares of the capital

stock of the Central Bank of Canada, but did not at the time of subscription, nor within thirty days thereafter, make any payment thereon. About eight months later, however, payment was made by B. to the bank, and the bank accepted payment from him, of twenty per cent. of the amount subscribed, and subsequently dividend cheques were issued by the bank in favour of B., were endorsed by him, and were paid.

Per HAGARTY, C. J. O. When B. in fact paid after the prescribed time it could be properly treated as a new subscription, whether he again wrote his name or not. The substantial requirements of the statute are complied with by holding that as soon as ten per cent was paid, and not till then, the signature was complete.

Per BURTON, and OSLER, J. J. A. Where there is an actually signed subscription contract, an actual receipt by the bank from the subscriber of a payment on account of a number of shares equal to those mentioned therein, and a subsequent receipt by that person of dividends on that number, an acknowledgment of the subscription contract at a time within which a payment could be effectually made thereon, is to be presumed, and under the circumstances B. and the bank were respectively estopped as against each other from denying that his subscription was re-acknowledged, and that he had been a stockholder.

Per MACLENNAN, J. A.—The payment not having been made within the prescribed time, the original subscription was void, but the subsequent payment accepted by the bank, and the endorsement by B. of the dividend cheques, operated as a new subscription.

Judgment of **BOYD, C.**, affirmed on these grounds.

No special directions as to the transfer of shares had been formally adopted by the directors, but the transfer book had been prepared for and adapted to, the system of marginal transfer. One **C.** transferred certain shares in blank, subject by marginal note, initialed by **C.**, to the order of a broker, and subject by a subsequent marginal note, initialed by the broker, to the order of **B.** **B.** signed an acceptance of the shares immediately under the transfer in blank, signed by **C.**, and was entered in the books of the bank as the holder of the shares, the intermediate transfers to and from the broker being omitted. The transfer to **B.** and the acceptance by him, took place within a month of the time of the suspension of the bank.

Held, affirming the decision of **BOYD, C.**, that this transfer and acceptance were a sufficient compliance with, or at least not in any way a violation of, the statutable provisions, and that **B.** became the legal holder of the shares, and was liable as a contributory.

Sections 70 and 77 of the Act must be read together, and make liable as contributories all those who hold shares at the time of the suspension of the bank, or who have held shares at any time within one month before the suspension.—*In the matter of the Central Bank of Canada—Baines's Case*, 237.

3. *Libel — Publication — Admission of manager — Liability of corporation for libel published by manager.*—The plaintiff was the patentee and manufacturer of an automatic steam injector, and the defendants were a company manufacturing automatic steam injectors,

one **J.** being their manager. A printed circular signed "Penberthy Injector Company," contained certain statements as to the mode in which the plaintiff had obtained his patent, and this action was brought by him on the ground that these statements were libellous. At the trial it was proved that the circular had been found in various places, but the only proof of publication was an admission by **J.**, made in conversation with the plaintiff, that the circular had been issued by the Penberthy Injector Company in reference to a circular issued by the plaintiff.

Held, that no authority can be inferred in a general manager or other officer of a bank or trading corporation of any kind to subject the corporation to actions for libel by his admissions to any person that he had published a libel on another person by their authority, and that there was therefore no proof of publication.

If **J.** had been called as a witness and had proved that he had been so authorized, and that it formed part of his duty to do the act complained of, then the libel would be the act of the corporation.

Tench v. Great Western R. W. Co., 33 U. C. R. 8, distinguished.

Decision of the Queen's Bench Division reversed. *Carroll v. Penberthy Injector Company*, 446.

4. *Subscription before incorporation — Allotment — Ontario Joint Stock Companies Letters Patent Act—R. S. O. ch. 157, sec. 2, sub-sec. 6—Contributory—Ontario Winding-up Act—R. S. O. ch. 183.*—**P.** signed an instrument purporting to be a subscription for shares in a company "proposed to be incorporated" under the Ontario Joint Stock

Companies Letters Patent Act, in which he agreed with the company and the signatories thereto, to take the number of shares set opposite to his name.

B. signed an instrument purporting to be an agreement to accept shares in a company not at the time incorporated.

P. and B. were not corporators named in the Letters Patent, and no shares were in fact every allotted to them, but they were entered in the books as shareholders, and notices of meetings and demands for payment of calls were sent to them, and in winding-up proceedings they were placed on the list of contributories.

Held, that there being no company in existence when the instruments in question were signed, they did not constitute binding contracts to take shares so as, without more, to make P. and B. liable as contributories.

The shareholders at the date of the issue of the Letters Patent are those persons only who are named therein and to whom stock is allotted thereby; and it is these persons and others who may afterwards become shareholders who constitute the company.

In re The Queen City Refining Co., 10 O. R. 264, explained.

Orders of the County Court of Middlesex and of the County Court of York reversed. *In the matter of The London Speaker Printing Co.*, —*Pearce's Case*, 508. *In the matter of the Speight Manufacturing Co.*—*Boulton's Case*, 508.

5. *Subscriber — Shareholder — Contributory* — R. S. O. (1877), ch. 150.]—C., after the incorporation of a company under the Ontario Joint Stock Companies Letters Patent Act, R. S. O. (1877),

ch. 150, signed a share subscription book with the following heading:—

“We, the undersigned, do hereby severally on behalf of ourselves, our and each of our several and respective executors and administrators acknowledge ourselves to be subscribers to the capital stock of the Zoological and Acclimatization Society of Ontario for the number of shares and to the amount set opposite our several and respective names and seals hereunder; and we do hereby covenant, promise, and agree, each with the other of us, and with S., to pay the amount of our said several subscriptions and all calls thereon, when and as the same may be called up and made under the provisions of the Ontario Joint Stock Companies Letters Patent Act, or under any by-laws which may be passed by the said company, and we request the number of shares for which we subscribe hereunder to be allotted to us.”

No shares were allotted to C., he was not entered in the books of the company as a shareholder, and never made any payments. Four years after this document was signed by C., the company was wound up, and he was held liable as a contributory.

Held, that this document did not, in the absence of any recognition by the company of C.'s position as a shareholder, alone and *ex proprio vigore* create the liability contended for.

Order of *BOYD, C.*, reversed.—*In the matter of the Zoological and Acclimatization Society of Ontario, Cox's Case*, 543.

See In re Bolt and Iron Co., 397.

CONDITION.

See McLean v. Brown, 106.

CONDONATION.

See MASTER AND SERVANT.

CONSTITUTIONAL LAW.

See COMPANY, 1.

CONTRACT.

See *Green v. Township of Orford*, 4—*McLean v. Brown*, 106—HUSBAND AND WIFE, 1—RAILWAYS, 2.

CONTRIBUTORY.

See COMPANY, 2, 4, 5.

CONTRIBUTORY NEGLIGENCE.

See *Hutchinson v. Canadian Pacific R. W. Co.*, 429 — NEGLIGENCE—RAILWAYS, 1.

CONVICTION.

See MALICIOUS ARREST.

CORPORATION.

See MUNICIPAL CORPORATIONS—COMPANY.

COSTS.

See *Adams v. The Watson Manufacturing Co.*, 2 — APPEAL—ASSIGNMENTS AND PREFERENCES—PARLIAMENTARY ELECTIONS—SOLICITOR AND CLIENT, 2—TRUSTS AND TRUSTEES.

COUNTY COURT.

Jurisdiction — Claim over \$200 — Liquidated or ascertained amount — R. S. O. ch. 47, sec. 19, subsec. 2.]—Pending negotiations for the sale by the plaintiff to the defendant of a certain business as a going concern the defendant entered into possession, made sales, and received moneys, entering the receipts in a cash book. The negotiations fell through, and the plaintiff brought this action in the County Court to recover “\$271.03 the return of moneys received by the defendant belonging to the plaintiff, being proceeds from sales of goods in plaintiff’s shop, as follows:” setting forth the sums received on each day by the defendant.

Held, that this sum was not ascertained by its receipt by the defendant and the bringing of the action by the plaintiff for the sum so received.

The increased jurisdiction applies only in the comparatively plain and simple cases where by the act of the parties or the signature of the defendant the amount is liquidated or ascertained *as being due* from one party to the other on account of some debt, covenant, or contract between them; such ascertainment of the amount by the act of the parties being something equivalent to the stating of an account between them.

Judgment of the County Court of Middlesex affirmed. *Robb v. Murray*, 503.

See APPEAL.

COUNTY JUDGE.

See MUNICIPAL CORPORATIONS 5.

CREDITOR.

• See VOLUNTARY CONVEYANCE, 1.

CREDITORS' RELIEF ACT.

Executions against three—Seizure and sale of joint or partnership property of two—Mode of distribution of proceeds.]—The Creditors' Relief Act is merely intended to abolish priority among execution creditors of the same class, and not to alter the legal effect of the executions themselves, or to effect a distribution of separate and partnership assets in the manner in which such assets are administered in bankruptcy.

There were in the sheriff's hands executions: (1) against R. alone; (2) against R., J. J., and G. J., on a joint note given by them for the price of a horse, J. J. being merely a surety for R. and G. J., who bought the horse as partnership property; (3) against G. J. and R. on a joint note given by them for the price of a threshing machine purchased for the purpose of being used in another partnership business carried on by them quite distinct from that partnership to which the horse belonged; and (4) against G. J. and R. on a joint note in which R. was surety only for G. J. The horse was seized and sold.

Held, BURTON, J. A., dissenting, that under an execution against three, the joint or partnership property of two may be levied, and that the proceeds of this sale were distributable ratably among the executions (2), (3), and (4).

Per BURTON, J. A. The proceeds of the sale should be applied in satisfaction of execution (3) alone, the property sold being the joint property of the persons liable under that execution.

Proceedings against partnership property under a separate execution against one of the partners considered. *Re McDonagh v. Jephson*, 107.

CROWN.

See REVENUE.

CUSTOMS DUTIES.

See REVENUE.

DAMAGES.

See *McLean v. Brown*, 106—*Canadian Locomotive Company v. Copeland*, 322—MUNICIPAL CORPORATIONS, 1, 4, 6—NEGLIGENCE.

DEBT.

See BILLS OF SALE AND CHATTEL MORTGAGES.—LANDLORD AND TENANT, 2.

DEED.

See SURVEY.

DEMURRAGE.

See *Canadian Locomotive Company v. Copeland*, 322.

DEPOSIT.

See *McLean v. Brown*, 106.

DESCRIPTION.

See SURVEY.

DISCOUNT.

See **BILLS OF SALE AND CHATTEL MORTGAGES.**

DISMISSAL.

See **MASTER AND SERVANT.**

DISTRESS.

See **ASSESSMENT AND TAXES—LANDLORD AND TENANT, 1—MORTGAGOR.**

DIVIDED COURT.

See **REVENUE.**

DOWER.

See **REGISTRY LAWS.**

DRAINAGE.

See **Green v. The Corporation of the Township of Orford, 4—MUNICIPAL CORPORATIONS, 2, 3.**

EASEMENT.

See **Duncan v. Rogers, 3.**

ELECTIONS.

See **PARLIAMENTARY ELECTIONS.**

ESTOPPEL.

See **SOLICITOR AND CLIENT, 1—RAILWAYS, 2.**

EVIDENCE.

See **Duncan v. Rogers, 3—McDonald v. Johnston, 430—ARBITRATION AND AWARD—RAILWAYS, 2.**

EXECUTION.

See **ASSIGNMENTS AND PREFERENCES—BILLS OF SALE AND CHATTEL MORTGAGES—CREDITORS' RELIEF ACT—MORTGAGOR—REVENUE.**

EXPROPRIATION.

See **MUNICIPAL CORPORATIONS, 1, 4, 6.**

EXTENT.

See **REVENUE.**

FRAUDULENT PREFERENCE.

See **ASSIGNMENTS AND PREFERENCES—BILLS OF SALE AND CHATTEL MORTGAGES—VOLUNTARY CONVEYANCE.**

FREIGHT.

See **Canadian Locomotive Company v. Copeland, 322.**

HIGH SCHOOLS.

See **PUBLIC SCHOOLS.**

HUSBAND AND WIFE.

1. *Contract—Married woman—R. S. O. ch. 132.*—To entitle a plaintiff to recover judgment on a contract entered into by a married woman, it

is necessary for him to show that at the time the contract was entered into by her she owned separate estate in respect of which she is entitled by statute to contract.

The defendant, a married woman, endorsed certain notes held by the plaintiff and wrote him the following letter :

"I hold 400 acres of land near W. which is worth \$33,000 and is all in my own name and right. By your renewing the note for \$1,500 and the other for \$600 I pledge myself solemnly to do nothing to affect my interest in the said lands either by deed or mortgage, unless said notes are paid to you in full."

The notes and the letter were proved at the trial and the examination of the defendant before the trial in which she stated that at the time she signed the notes she owned property on her own account, was also put in. There was no evidence as to the date of the marriage of the defendant or as to the mode in which the property was held by her.

Held, reversing the decision of *Boyd, C.*, that there was not sufficient evidence to entitle the plaintiff to recover. *Moore v. Jackson*, 431.

2. *Breach of promise of marriage—Justification of breach—Statute of Limitations.*—In an action for breach of promise of marriage bodily unchastity subsequent to the promise is a defence, but not that the woman was in the habit of swearing, or of using coarse, obscene, or profane language.

Quære, whether evidence of the latter matters can be admitted in mitigation of damages.

Mere lapse of the time fixed for the marriage, when the parties continue thereafter to conduct themselves as engaged persons, is not

necessarily a breach of the promise. There must be a refusal or something equivalent to a refusal after the time fixed for performance before the Statute of Limitations begins to run.

Judgment of the Queen's Bench Division affirmed. *Grant v. Cornock*, 532.

See VOLUNTARY CONVEYANCE.

INTENT TO PREFER.

See BANKRUPTCY AND INSOLVENCY.

INTEREST.

See Archbold v. The Building and Loan Association, 1.

INVESTMENT.

See SOLICITOR AND CLIENT, 1.

JOINT AND SEVERAL EXECUTIONS.

See CREDITORS' RELIEF ACT.

JUDGMENT.

See REVENUE.

JURISDICTION.

See APPEAL—COUNTY COURT.

JURY.

See McDonald v. Johnston, 430
—APPEAL—MASTER AND SERVANT.

JUSTICES OF THE PEACE.

See MALICIOUS ARREST.

JUSTIFICATION.

See HUSBAND AND WIFE, 2.

LANDLORD AND TENANT.

1. *Lease with proviso for determination in case of assignment for the benefit of creditors—Right reserved to distrain after such assignment—Amount for which distress may be made—* 50 Vic. ch. 23, (O.)—*R. S. O. ch. 143.*—B., by lease dated 28th of November, 1887, was lessee for five years from the 1st of February, 1888, of certain premises at a yearly rental of \$370, payable quarterly in advance, the lease containing a provision that if the lessee should make any assignment for the benefit of his creditors, the then current year's rent should immediately become due and payable, and might be distrained for, but that in other respects the term should immediately become forfeited and at an end. It was also agreed that the Act 50 Vic. ch. 23 (O.), should not apply to the lease. B. paid \$100 on account of rent on the 7th July, 1888, and on the 16th July, 1888, made an assignment to the plaintiff for the benefit of his creditors, and the plaintiff went into possession of the premises, and remained in possession until the 1st of September, 1888. On the 24th July, 1888, the defendants distrained for, and were paid by the plaintiff, as assignee, \$270, the balance of the current year's rent.

Held, that the lease did not become void because of the assignment,

but only voidable; that the right to claim the accelerated rent depended, not upon the lessors' election to forfeit the term, but upon the fact of the lessee having made an assignment for the benefit of his creditors; that the clause was divisible; and that the lessors might distrain for the rent as they had not elected to forfeit the term, the distress itself not being an election to forfeit.

Held, also, that the goods in the possession of the assignee were not *in custodia legis* so as to protect them from distress.

The position and liability of such an assignee on becoming assignee of the term, considered.

Wyld v. Clarkson, 12 O. R. 589, explained; *Atkinson v. Baker*, 14 A. R. 409. and *Griffith v. Brown*, 21 C. P. 12, considered.

Judgment of the County Court of Wentworth varied. *Linton v. The Imperial Hotel Company*, 337.

2. *Payment of taxes by tenant—Rent—Tenant acquiring title by possession—Real Property Limitation Act—R.S.O. ch. 111, sec. 5, sub-sec. 6—Acknowledgment of barred debt.*—A tenant agreed to pay for certain premises six dollars a month and taxes, and for some eighteen years remained in possession, paying the taxes to the municipality, and paying nothing else.

The tenant, after the expiration of this period, gave to his landlord an acknowledgment of indebtedness for rent for the whole period.

Held, that the payment of taxes was not a payment of rent within the meaning of the Real Property Limitation Act, and that the tenant, although he had always intended to hold merely as tenant, had acquired title by possession, and could not make himself liable as for rent accru-

ing after he had so acquired possession by giving to the landlord an acknowledgment of indebtedness in respect of rent.

Davis v. McKinnon, 31 U. C. R. 564, observed upon.

Judgment of the Queen's Bench Division reversed, and that of STREET, J., at the trial restored. *Finch v. Gilray*, 484.

See MORTGAGOR.

LEASE.

See LANDLORD AND TENANT.

LIBEL.

See COMPANY, 3.

LIEN.

See ASSESSMENT AND TAXES—ASSIGNMENTS AND PREFERENCES—SOLICITOR AND CLIENT, 2.

LIMITATIONS, STATUTE OF.

See HUSBAND AND WIFE, 2 — LANDLORD AND TENANT, 2.

LIQUIDATED AMOUNT.

See COUNTY COURT.

LOCAL IMPROVEMENTS.

See MUNICIPAL CORPORATIONS, 6.

MALICIOUS ARREST.

Justices of the Peace — Conviction for having liquors for sale near public works—Destruction of liquors — Necessity for quashing conviction before bringing action — Unsealed conviction returned on certiorari—Power to put in sealed conviction after such return—Notice of action—Statement of cause of action—Service of notice—Order of Justices — Necessity for quashing order before bringing action—Venue — New trial—R. S. O. (1877) ch 32, secs. 2, 6, and 7 ; R. S. O. (1887), ch. 35, secs. 2, 6, and 7 ; R.S. O. (1877), ch. 73 ; R. S. O. (1887), ch. 73.]—The defendant C. and others were contractors employed in constructing a portion of the line of the Canadian Pacific Railway, on the north shore of Lake Superior, 50 miles north of the mouth of the Michipicoten River, where there is a post of the Hudson Bay Company and a small collection of houses and stores, known by the name of the village of Michipicoten River. At this place the defendant C. and his co-contractors had their head-quarters, and had constructed a supply road to the line of the railway where their operations were being carried on. The plaintiff brought to this village in a small sailing vessel a quantity of intoxicating liquors, intending to sell them there. The defendant C. and his co-defendant B., who were justices of the peace, having jurisdiction in the district of Algoma, assuming to act under ch. 32 R. S. O. (1877) "An Act respecting the Sale of Intoxicating Liquors near Public Works." caused the liquors to be seized and destroyed, and the plaintiff to be arrested, fined, and imprisoned.

Held, that this was a village within the meaning of R. S. O. ch. 32, sec.

l, and therefore that the prohibition contained in the Act did not apply, and that the justices had no jurisdiction.

The plaintiff was discharged upon a writ of *habeas corpus*, the justices having returned to the *certiorari* issued in aid of the *habeas corpus*, a paper purporting to be the conviction signed by them, but not under their seal. The conviction was not quashed.

Held, that after the return to the *certiorari*, a new conviction could not be returned, and that as the conviction returned was not sealed, it was a nullity and need not be quashed before an action was brought.

The notice of action stated that one month after the service of the notice, an action would be brought for malicious arrest, &c., and for the malicious, &c., destruction of goods, and for damages for loss of time and injury to business, and for the recovery of costs and expenses, &c., "same having been committed by you against me in the month of May last, at said village of Michipicoten River, and at the town of Port Arthur."

The notice was served on the defendant B. personally, and was served on the agent of the defendant C. at the head office of the defendant C. at Michipicoten River, and a copy was also left for the defendant C. at his place of residence at Port Arthur, and another copy was served on his solicitors. The defendant C. admitted that he had seen a copy of the notice, but it was not shown at what time or place he had seen it.

Held, that the notice and service were sufficient.

Semble, the omission to give notice of action must be pleaded, or the section which requires it referred to in the plea of "not guilty by statute."

The venue in the action was laid at the city of Toronto, and subsequently, by consent, an order was made, striking out the jury notice, and directing the trial to take place at Port Arthur.

Held, that in view of this order, the objection that the venue was improperly laid could not be sustained.

The order for the destruction of the liquors was not produced, but the person who destroyed the liquors, stated, without objection, that he had received a written order to destroy the liquors, signed by both justices, and that he had returned the order to them. This order had not been quashed.

Held, that the defendants were entitled to say that the existence of such an order was proved, but that the order for the destruction and the adjudication of forfeiture were two different things, and that in order to obtain protection, the order or adjudication of forfeiture should have been proved, and that it was not necessary to quash a mere order for destruction.

The order spoken of in R. S. O. (1877) ch. 73, sec. 4, is an order in the nature of a conviction, i. e., an original adjudication by the magistrate upon some matter brought before him by charge, complaint, conviction, or otherwise, and not an order for the purpose of carrying out or enforcing such adjudication.

Upon an application to the Divisional Court for a new trial, the defendants produced a document, which, it was alleged, was the written order under which the liquor was destroyed.

Held, that as there was no explanation why this order was not produced at the trial, it was too late to produce it now, and a new trial could not be granted, even assuming

that the order contained the adjudication as to the forfeiture of the liquors.

Judgment of the Common Pleas Division affirmed.—*Bond v. Conmee*, 398.

MANAGER.

See COMPANY, 3.

MANAGING DIRECTOR.

See *In re Bolt and Iron Co.*, 397.

MARRIAGE.

See HUSBAND AND WIFE.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

Wrongful dismissal — Condonation — Province of Jury.] — In an action of damages for wrongful dismissal tried with a jury, it is for the Judge to say whether the alleged facts are sufficient in law to warrant a dismissal, and for the jury to say whether the alleged facts are proved to their satisfaction.

If good cause for dismissal exists it is immaterial that at the time of dismissal the master did not act or rely upon it, or did not know of it and acted upon some other cause in itself insufficient.

When the master has full knowledge of the nature and extent of misconduct on the part of his servant sufficient to justify dismissal,

he cannot retain him in his employment, and afterwards at any distance of time, turn him away for that fault, without anything new, but this condonation is subject to the implied condition of future good conduct, and whenever any new misconduct occurs the old offence may be invoked and may be put in the scale against the offender as cause for dismissal.

Condonation is a question of fact for the jury if in the opinion of the Judge there is any evidence of it to be laid before them.

Judgment of the County Court of Elgin affirmed. *McIntyre v. Hockin*, 498.

MASTER OF VESSEL.

See *Canadian Locomotive Company v. Copeland*, 322.

MAXIMS.

Cujus est solum ejus est usque ad coelum.]—See WILL.

MORTGAGOR AND MORTGAGEE.

Re-demise clause—Landlord and tenant—Right to distrain.] — On the 31st of May, 1883, one D. mortgaged to the plaintiffs certain lands to secure the sum of \$20,000 then advanced by them to him. The advances were repayable as follows: \$500 on the 1st of December, 1883; \$500 in each of the months of June and December in each of the four following years; and \$15,500 on the 1st of June, 1888; together with interest at the rate of seven per centum per annum from the 1st of

June, 1883, to be paid half-yearly on the 1st days of June and December in each year. The mortgage was made in pursuance of the Act respecting Short Forms of Mortgages, and contained the following clause described in the margin as "Redemise clause:"

"And the mortgagees lease to the mortgagor the said lands from the date hereof until the date herein provided for the last payment of any of the moneys hereby secured undisturbed by the mortgagees or their assigns, he, the mortgagor, paying therefor in every year during the said term, on each and every of the days in the above proviso for redemption appointed for payment of the moneys hereby secured, such rent or sum as equals in amount the amount payable on such days respectively according to the said proviso, without any deduction. And it is agreed that such payments when so made shall respectively be taken and be in all respects in satisfaction of the moneys so then payable according to the said proviso."

The mortgage did not contain the statutory distress clause or the statutory clause providing for possession by the mortgagor until default, and it was not executed by the mortgagees. At the time it was given D. was himself in occupation of certain of the properties comprised in it of the annual rental value of about \$1,200 while the other properties comprised in it were in the occupation of tenants of D. and were producing an annual rental of about \$2,000. After the execution of the mortgage the properties continued to be occupied in the same manner by D. or his tenants, and some payments under the mortgage were duly made by D. In 1887 the goods of D., on one of the properties comprised in

the mortgage, and occupied by him, were seized under execution against him and sold, and the plaintiffs claimed that as landlords they were entitled to be paid out of the proceeds of the sale the amount due to them for the unpaid instalments of principal and interest of June and December, 1886.

Held, reversing the judgment of the Queen's Bench Division, that this claim was well founded, the relation of landlord and tenant having been validly created between the parties and the execution creditors in the absence of fraud not being entitled to complain.

Trust and Loan Company v. Lawson, 6 A. R. 286, 10 S. C. R. 679, distinguished. *The Ontario Loan and Debenture Co. v. Hobbs*, 255.

See *Archbold v. The Building and Loan Association*, 1—REGISTRY LAWS—VOLUNTARY CONVEYANCE, 2.

MUNICIPAL CORPORATIONS.

1. *Jurisdiction over streets—Changing level of street—Damage to adjacent owners—Absence of by-law—Remedy by action or arbitration.*—*Heid*, (BURTON, J. A., dissenting) affirming the decision of BOYD, C., that a municipal corporation can exercise and perform their statutable powers and duties in repairing highways or bridges or erecting a new bridge instead of an old and unsafe one without passing a by-law therefor, and that the plaintiff, whose premises were "injuriously affected" by the level of the street on which they fronted, being raised in order to construct a proper approach to a bridge that the defendants were lawfully re-building, could not maintain an action against the defendants,

but must, in the absence of any negligent construction, proceed under the arbitration clauses of the Municipal Act, R. S. O. ch. 184, notwithstanding the absence of any by-law for the prosecution of the work.

Per BURTON, J. A. There was no obligation cast upon the defendants to re-build the bridge at such a height as to necessitate a change in the level of the street, and therefore the defendants could not lawfully change the level of the street without passing a proper by-law for that purpose.

Yeomans v. The County of Wellington, 4 A. R. 301, followed; *McGarvey v. The Town of Strathroy*, 10 A. R. 636, and *Adams v. The City of Toronto*, 12 O. R. 243, discussed; *Van Egmond v. The Town of Seaforth*, 6 O. R. 610, distinguished. *Pratt v. The Corporation of the City of Stratford*, 5.

2. *Drainage Acts—Construction of statute—By-law for repair of old drain—Assessing land benefited.*—On the 21st September, 1868, a by-law was passed by the Township Council under the provisions of the Municipal Act of 1866—29 & 30 Vic. ch. 51, secs. 281 and 282—for the construction of (among other drains) the M. drain, and the drain was thereupon constructed. On the 11th December, 1883, the Township Council passed a by-law for repairing and cleaning this drain, and directed that the amount required for this purpose should be assessed and levied on the lands assessed for the original construction of the drain. On the 21st September, 1886, another by-law was passed to change, in accordance with the report of an engineer, the assessment made for the original construction of the M. drain so as to

enable the assessment for repairing and cleaning the drain to be made more equitably, and a new assessment for repairing the drain was adopted. This assessment for repairing and cleaning the drain was limited to the lands assessed for the original construction of the drain, although the engineer in his report pointed out that large tracts of land not assessed for the original construction of the drain were now benefited by it.

Held, that the provisions of the Act of 1869,—32 Vic. ch. 43, sec. 17,—as to maintenance and repair, [now R. S. O. ch. 184, sec. 583 (1),] are not retroactive, and do not apply to drains constructed before the date of that enactment; and that therefore the township council had no power to pass the by-law in question.

Per HAGARTY, C. J. O.—The by-law was also bad because the assessment for repairs was limited to the lots assessed for the original construction of the drain, and did not embrace the lots subsequently benefited.

Per BURTON, J. A.—Assuming the case to come within the Act of 1866, the assessment was properly limited to the lots assessed for the original construction of the drain.

Decision of ROBERTSON, J., affirmed on other grounds. *In the matter of Clarke and the Corporation of the Township of Howard*, 72.

3. *Drainage by-law — Petitioners for—Necessity for application by majority of owners benefited — R. S. O. ch. 184, secs. 291, 292, and 569.*—A petition of land owners under 46 Vic. ch. 18, sec. 570 (R. S. O. ch. 184, sec. 569), for the construction of drainage works must include a majority of all the persons found by the engineer to be benefited by the proposed works

and not merely a majority of the persons mentioned in the petition itself as being benefited.

Unless the petition is signed by such majority the council have no jurisdiction, and a by-law founded on a petition not so signed is void, and cannot be upheld, even though valid on its face.

If the petition is not signed by such majority, the opponents of the by-law are not restricted to the mode of objection given by sections 292 and 293 of the Act of 1883 (R.S.O. ch. 184, secs. 291 and 292), but are entitled to attack the validity of the by-law on this ground by application to quash even after an unsuccessful appeal to the council.

Where a council know that a majority have not signed, though no evidence to prove this fact is given by the opponents of the by-law, it is just as much their duty not to pass the by-law as if its insufficiency had been proved after the most elaborate investigation at the instance of persons opposed to it, and they have no right to impose upon the opponents of the by-law as a term for refusing to pass it, any condition as to payment of expenses theretofore incurred.

Decision of STREET, J., reversed. *In the matter of Robertson and the Municipal Council of the Township of North Easthope*, 214.

4. *By-law to open road—Trespass—Necessity for quashing by-law before bringing action—R. S. O. ch. 184, sec. 338—Tree Planting Act—R. S. O. ch. 201.*—A municipal council passed a by-law to open a road in a certain defined course, and by a subsequent by-law appointed the defendant M., a commissioner, to remove all obstructions from the highway so defined. M. cut down

some trees of the plaintiffs, and removed these and portions of fences. Actions of trespass were brought against M. and the council, but the by-laws had not been quashed.

Held, that the road defined in the by-law was the true road, and could properly be opened as therein defined.

Held, also, (BURTON, J. A., doubting, but not desiring to express a judicial opinion,) that whether the road defined in the by-law was the true road or not, and whether therefore a trespass was committed or not, the by-laws being under certain conditions and requirements within the general competence of the council, and not being quashed, afforded a complete defence to the actions.

Observations on the construction of the "Tree Planting Act."

Judgments of the Queen's Bench Division reversed. *Connor v. Middagh*, 356; *Hill v. Middagh et al.*, 356.

5. *Investigation by County Judge—Prohibition—R. S. O. ch. 184, sec. 477.*]

—Where the County Court Judge is making an investigation pursuant to the resolution of a council under R. S. O. ch. 184, sec. 477, he is acting as *persona designata*, and not in a judicial capacity, and is not subject to control by a writ of prohibition.

That writ is not to be applied to any proceedings of any person or body of persons, whether they be popularly called a court or by any other name, on whom the law confers no power of pronouncing any judgment or order imposing any legal duty or obligation on any individual.

Re Squier, 46 U. C. R. 474, considered.

Decision of ROBERTSON, J., reversed. *In the Matter of Godson and the City of Toronto*, 452.

6. *Expropriation of one foot strip of land across street—Quantum of damages—Local improvements.*

—The appellants the owners of a block of land, laid it out in building lots, dedicating as a street called D. street a portion of the land running through it from a street on the east to within one foot of its west limit, the one foot being reserved because at that time W., the owner of the land adjoining on the west, refused to dedicate any portion of it for the purpose of carrying D. street through to the next street to the west. Subsequently the owner of the land adjoining laid out his property in building lots, dedicating as a street, also called D. street, a portion of it running (in the same line as the portion dedicated by the appellants), through it from the street on the west to within one foot of its east limit, the one foot reserved by him immediately abutting on the strip reserved by the appellants. Subsequently the appellants sold all their land except the one foot strip and afterwards the corporation expropriated the two strips to make D. street a thoroughfare, and the appellants in an arbitration under the Municipal Act were allowed merely nominal damages for their strip.

Held, (BURTON, J.A., dissenting), that this was right, there being no evidence that the property had any market value in the hands of the owners or was worth anything except for the purpose of opening the street, or that it was capable of being put to any other use whatever. The higher price that the appellants might have obtained for their lots if the street had been made a thoroughfare before the lots were sold, or the price that the residents on the street might be

willing to give to have the obstruction removed, could not be considered as elements in fixing the damages.

Per OSLER, J.A.—The appellants' foot of land was useless for the purpose of extending the street so long as W.'s reserve stood in the way; and the contingency of W. selling it, depending, as it did, upon the volition of a person over whom the appellants had no control, was too uncertain to be taken into account as an element of value.

Per OSLER, J.A.—Where works are done under the local improvement clauses of the Municipal Act, compensation for property expropriated is to be ascertained in the same manner, and by the application of the same principles, as in cases where the corporation are not acting under those clauses, and this whether the corporation initiate the proceedings, or they are put in motion by the petition of the parties who desire the improvements to be made. There is nothing to justify the notion that in the latter case more is to be paid for the work than if the cost had to be borne by the corporation.

Order of BOYD, C., affirmed. *In the matter of Harvey and Mitchell and the Town of Parkdale*, 468.

See *Green v. The Corporation of the Township of Orford*, 4—PUBLIC SCHOOLS—RAILWAYS, 2.

NEGLIGENCE

1. *Railways — Carelessness contributing to accident — Approach to station.*]—To reach from the highway the station of the defendants at Point Edward, it is necessary to go through the railway yard and cross eleven railway tracks. A plank walk, unfenced and un-

guarded, runs across these tracks, extending from the street to the east end of the station platform. The husband of the plaintiff, who was familiar with the locality, while hurrying to the station before daylight, left this plank walk upon reaching the track nearest the platform in order to walk round the rear of a train that was coming in from the east on that track and was still in motion. While some twenty feet from the plank walk, walking between the tracks and near the rails of the track second from the platform, he was struck by the the buffer beam of a shunting engine and killed. 'This shunting engine had been standing some 150 feet to the west of the plank walk, and was passing slowly to the east for the purpose of being switched on to the track nearest the platform, and then aiding in placing in the ferry boat the cars of the train that had just come in. The shunting engine had been standing to the west of the plank walk for the purpose of convenience in giving orders to the engineer; its head-light was burning, and as it moved its bell was ringing. There was ample space between the two tracks for a person to stand in safety, and the approach of the shunting engine could easily be noticed.

Held, (HAGARTY, C. J. O., dissenting), reversing the decision of the Chancery Division, that the accident was due to the carelessness of the deceased, and not to the negligence of the defendants, and that the plaintiff could not recover.

The extent of the duty of railway companies in providing safe access to their stations considered. *Jones v. The Grand Trunk Railway Company*, 37.

2. *Injury caused by runaway horse—Liability of owner — Onus of proof.*]—The plaintiff, while walking on the sidewalk, was knocked down and injured by the runaway horse of the defendant. At the time of the accident the horse was harnessed to a sleigh, but no person or driver was in the sleigh, and all that was proved was, that the horse was seen running away; that the sleigh upset, the occupants being thrown out, and that the horse ran on the sidewalk, and the accident occurred.

Held, that this was sufficient to make out a *prima facie* case of negligence, and that the onus of disproving that case and explaining the cause of the runaway lay upon the defendant.

Manzoni v. Douglas, 6 Q. B. D. 145, discussed.

Judgment of the Queen's Bench Division affirmed. *Crawford v. Upper*, 440.

See Hutchinson v. Canadian Pacific R. W. Co., 429—RAILWAYS, 1—SOLICITOR AND CLIENT, 1.

NEW TRIAL.

See McDonald v. Johnston, 430—MALICIOUS ARREST.

NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

NOTICE OF ACTION.

See MALICIOUS ARREST.

NOTICE OF DISHONOUR.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES.**

ONUS OF PROOF.

See **NEGLIGENCE.**

PARLIAMENTARY ELECTIONS.

Private prosecutor — Prosecution under R. S. C. ch. 8, sec. 111—Costs.—The plaintiffs were tried for bribery at an election, at the Haldimand Assizes, in the Spring of 1887, and acquitted. The information upon which the indictment was supposed to have been founded was laid against them by the defendant, and he was examined as a witness before the grand jury. At the conclusion of the trial the presiding Judge, at the request of the counsel for the accused, indorsed on the indictment the statement that it was proved that the defendant was the private prosecutor. The plaintiffs taxed their costs of the prosecution, and brought this action to recover payment of these costs from the defendant. The information and indictment (there being no evidence connecting the latter with the former), with the endorsement and the fact that the defendant was examined as a witness before the grand jury, was the only evidence that the defendant was the private prosecutor.

Held, that the endorsement on the indictment had no force as a judgment or finding of fact and could not be accepted as proof of the defendant's position.

Held, also, that the facts that the information was laid by the defen-

dant, and that he was examined as a witness before the grand jury, were not sufficient evidence that he was the private prosecutor.

Decision of the County Court of the County of Lincoln reversed. *May v. Reid*, 150.

PARTIES.

See *Adams v. The Watson Manufacturing Co.*, 2.

PARTNERS.

See **BILLS OF SALE AND CHATTEL MORTGAGES — CREDITORS' RELIEF ACT—SOLICITOR AND CLIENT**, 4.

PLAN.

See **SURVEY.**

POSSESSION.

See **LANDLORD AND TENANT**, 2.

PRACTICE.

1. The formal judgment or order appealed from should be printed in the appeal book. *Thompson v. Robinson*, 175.

2. Where no written judgment has been delivered by the Court appealed from, a statement of the grounds assigned therefor should be obtained from the reporter or noted by counsel who attend to hear judgment, and should be inserted in the appeal book. *Blackley v. Kenny*, 522.

See Adams v. The Watson Manufacturing Company, 2—APPEAL—COMPANY, 1—MALICIOUS ARREST—TRUSTS AND TRUSTEES.

PRESENTMENT.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PRIORITIES.

See REGISTRY LAWS.

PRIVATE PROSECUTOR.

See PARLIAMENTARY ELECTIONS.

PROHIBITION.

See MUNICIPAL CORPORATIONS, 5.

PROMISE OF MARRIAGE.

See HUSBAND AND WIFE, 2.

PROMISSORY NOTE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PROSECUTOR.

See PARLIAMENTARY ELECTIONS.

PUBLICATION.

See COMPANY, 3.
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PUBLIC SCHOOLS.

High schools — Application for municipal grant — R. S. O. ch. 226, secs. 25 and 35.] — Held, that the words "maintenance, accommodation, and other necessary expenses" in sub-sec. 6, of sec. 25 R. S. O. ch. 226, include the purposes mentioned in sec. 35, (1) and consequently an application under sec. 35, (1) must be made before the first day of August.

Held, also, that an application under sec. 35, (1) must be the corporate act of the school board, not merely the verbal request (however unanimous) of the individuals composing it, and must specify the purposes for which the money is required.

Held, also, (MACLENNAN, J. A., dissenting) that to come within the provisions of sec. 35, an application must be an independent application for purposes mentioned in that section, and that an application combining other purposes with these purposes, may be rejected by a simple majority vote.

Held, also, that an application under sec. 35, may be rejected by the council, although no formal by-law relating to the purposes of the application is before the council, and the meeting at which the rejection takes place has not been called for the special purpose of considering such a by-law.

Per MACLENNAN, J. A.—Quære, whether a township comes within the Act.

Decision of BOYD, C., reversed. Re Oakwood and Township of Mariposa, 87.

QUASHING BY-LAW.

See MUNICIPAL CORPORATIONS, 4.

QUASHING CONVICTION.

See MALICIOUS ARREST.

RAILWAYS.

1. *Highway Crossing—Omission to give statutory warning—Contributory negligence.*]—A traveller on approaching a railway crossing is bound to use such faculties of sight and hearing as he may be possessed of, and when he knows he is approaching a crossing, and the line is in view, and there is nothing to prevent him from seeing and hearing a train if he looks for it, he ought not to cross the track in front of it, without looking, merely because the warning required by law has not been given. *Weir v. The Canadian Pacific R. W. Co.*, 100.

2. *Agreement to erect and establish stations—Admissibility of oral representations to vary written agreement—Res adjudicata.*]—By agreement bearing date the 19th day of May, 1873, the defendants in consideration of a bonus of \$300,000 granted to them by a section of the county of Simcoe, of which the township of Nottawasaga forms a part, covenanted with the plaintiffs to (among other things) "erect, build, and complete good and sufficient and suitable station buildings for passengers and freight" at five certain places within the township; to "establish at each of the places hereinbefore mentioned regular way stations," and to "well and sufficiently keep and maintain the said five stations above mentioned with all such suitable, necessary, and proper buildings as the business done or capable of being done at the said stations respectively may require for seven years after

the trains shall have commenced to run on the said road and (to) undertake to do the passenger and freight business of the county at said stations."

By a further agreement bearing date the 25th day of May, 1878, the defendants in consideration of a bonus of \$20,000 granted to them by the plaintiffs, covenanted with the plaintiffs to "erect, build, and complete good and sufficient and suitable station buildings for passengers and freight on the line of the said railway at the several places following in the said township," five places being specified, and to "establish at each of such places regular way stations." This agreement provided that the route of the line of the railway through the township as defined in the former agreement might be deviated from to such an extent as to admit of the stations being located at the points mentioned in the second agreement, and provided further that it should not be incumbent on the defendants to erect stations at the places mentioned in the former agreement, "but that the places herein defined for stations shall be taken to be in substitution for the places mentioned in such former agreement."

The defendants erected stations at the points specified, three of these stations being respectively called A., G., and N. Trains commenced to run on the line in the year 1879.

In 1880 the plaintiffs being dissatisfied with the mode in which the stations at G. and N. were being maintained brought an action against the defendants for specific performance of the agreements. In this action a consent decree was pronounced, and an injunction granted restraining the defendants from ceasing to maintain the stations except in a certain manner in the decree

specified. The decree contained no limitation or other provision as to the time during which the stations were to be maintained, though this question had been raised at the hearing of the action.

In 1886, after the expiration of the seven years, the defendants made changes in their mode of maintaining the station at A., and kept it open for about four hours a day only. The plaintiffs were dissatisfied and this action was thereupon brought by them to compel specific performance of the agreements.

Held, reversing the judgment of ROBERTSON, J., that the word "establish" does not, in itself, mean "maintain and use for ever;" that the seven years' limitation applied to the substituted stations, and that the defendants were not bound to maintain them after the expiration of that time.

Bickford v. The Town of Chatham, 14 A. R. 32, and in the Supreme Court, (not reported), *Jessup v. Grand Trunk R. W. Co.*, 7 A. R. 123, and *Geauyeau v. Great Western R. W. Co.*, 3 A. R. 412. considered; *Wallace v. Great Western R. W. Co.*, 3 A. R. 44, distinguished.

Held, also, that the decree in the former action did not constitute the question of the seven years limitation *res adjudicata*; there being no adjudication on that question, and in any event an adjudication on that question being unnecessary at the date of the former action; *Concha v. Concha*, 11 App. Cas. 541, considered and followed.

At the trial, evidence was admitted on behalf of the plaintiffs of representations made by directors of the defendant company, at meetings held to consider the question of granting the second bonus, to the effect that by the second agreement

the defendants would be bound to maintain the stations for all time.

Held, that this evidence was clearly inadmissible. *Nottawasaga v. Hamilton and N. W. R. W. Co.*, 52.

See Hutchinson v. Canadian Pacific R. W. Co., 429—NEGLIGENCE.

REDEMISE CLAUSE.

See MORTGAGOR.

REDEMPTION.

See Archbold v. The Building and Loan Association, 1.

REFERENCE.

See COMPANY, 1.

REGISTRY LAWS.

Priorities — Unregistered mortgage—Dower.]—R. G. and J. G. being the owners, subject to the dower of their mother R., and an annuity in her favour, of certain lands, mortgaged them to one C. to secure advances made by him to them. R. knew of the mortgage and was asked, but refused, to execute it. Subsequently R. G. and J. G. mortgaged the lands to M. to secure advances made by him. R. released all her claims for the purpose of this mortgage, but received no benefit from the advances. This mortgage was taken by M. without any notice of the mortgage to C., and was registered before it, and gained priority over it. Under this mortgage the lands were sold, and after payment of the claim of the plain-

tiffs a surplus remained which R. claimed in priority to C.

Held, reversing the decision of *Boyd, C.*, that she was not entitled to priority. The priority gained by M. by force of the Registry Act did not enure to her benefit as she was not a purchaser or mortgagee, nor did that priority enure to her benefit as surety by virtue of the doctrine of subrogation, because that doctrine could not be invoked to defeat the honest claims and superior equities of a third person. *MacLennan v. Gray*, 224.

RENT.

See LANDLORD AND TENANT.

REPLEVIN.

See ASSESSMENT AND TAXES.

RES ADJUDICATA.

See RAILWAYS, 2—REVENUE.

REVENUE.

Customs duties — Assignment for the benefit of creditors — Preference of Crown over subject—Writ of extent—R.S.O. ch. 94.]—On the 3rd February, 1887, B., a coal merchant, made an assignment to the plaintiff for the benefit of his creditors. At the time of this assignment, there was due by B. a large sum for duty on coal that had been previously imported by him and sold. The Crown claimed payment from the plaintiff, as assignee of B., of the amount due for duties

in priority to the payment of the claims of the general creditors of the estate.

Held, affirming the judgment of *ARMOUR, C.J.*, that the Crown was not entitled to such priority, and that, if it elected to come in under the assignment, it was bound by the terms thereof, and could take only ratably and proportionately with the other creditors.

By an agreement entered into before action, the Crown was placed in the same position as if a writ of extent had been issued against B. on the 19th day of February, 1887, for the recovery of the duty payable by B.

Held, in this also affirming the judgment of *ARMOUR, C.J.*, that a writ of extent so issued would have availed the Crown nothing as far as any property covered by the assignment was concerned.

Observations upon the effect of a decision where the Court is equally divided. *Clarkson v. The Attorney-General of Canada*, 202.

RULES.

Rule 103, O.J.A.]—See *Adams v. The Watson Manufacturing Company*, 2.

SALE OF CARGO.

See *Canadian Locomotive Company v. Copeland*, 322.

SALE OF GOODS.

See *McLean v. Brown*, 106.

SALE FOR TAXES.

See ASSESSMENT AND TAXES.

SALE UNDER EXECUTION.

See CREDITORS' RELIEF ACT.

SECURITY FOR COSTS.

See SOLICITOR AND CLIENT, 2.

SET-OFF.

See In re Bolt and Iron Co., 397.

SHARES AND SHAREHOLDERS.

See COMPANY.

SHERIFF.

See CREDITORS' RELIEF ACT.

SOLICITOR AND CLIENT.

1. *Negligence of solicitor in making investments—Liability of partner.*—R., a practising solicitor, was retained by the plaintiff to manage her business affairs, and he obtained from her and invested large sums of money in mortgage securities. A year afterwards R. entered into partnership with the defendant W., and the firm carried on business as solicitors and conveyancers and had in their hands several estates to manage. It was agreed when this partnership was formed that W. should have no interest in the plaintiff's business which continued to be managed

entirely by R., but the entries in connection therewith were made in the books of the firm, moneys received on the plaintiff's account were deposited with the firm's moneys and from time to time re-invested by the firm, or paid to the plaintiff or to R. by cheques of the firm, and charges paid by borrowers went into the profits of the firm. Losses occurred owing to the insufficient value of some the mortgaged properties.

Held, [BURTON, J. A., dissenting,] affirming the judgment of the Queen's Bench Division, and that of BOYD, C., at the trial, that under the circumstances, particularly because of the money having been actually received by the firm, and again paid out by them to the borrowers, both partners were liable for the negligence complained of.

Per HAGARTY, C.J.O. The business being *prima facie* within the scope of the partnership business, W. was liable, and to escape liability he should, when the partnership was formed, have given notice to the plaintiff that he was not to be liable.

Per BURTON, J.A. R. alone was retained by the plaintiff, and as it was a term of the partnership that W. was to have no interest in the plaintiff's business, there was no duty cast upon him to give notice to her. Any liability to her could arise only by estoppel, and there was nothing amounting to estoppel in this case.

During the partnership, the plaintiff, acting on R.'s advice, allowed him to invest moneys in the purchase of lands in Dakota, it being agreed that he was to pay her interest on the moneys so invested, and that any profits were to be divided between the plaintiff and R. W. had no knowledge of this transaction. The moneys so invested were lost.

Held, reversing the judgment of the Queen's Bench Division, and affirming that of BOYD, C., at the trial, that this was a transaction clearly outside the scope of the partnership business, and that W. was not liable. *Thompson v. Robinson*, 175.

2. *Lien — Funds recovered in action—Security for costs to be incurred.*—Actions were brought by one G. against two insurance companies to recover losses occasioned by a fire. The actions were tried together, and in one the plaintiff recovered judgment, but the other was dismissed with costs. The defendants acted as G.'s solicitors in each action. By a special agreement, upon the faith of which each action was carried on, the solicitors were to have a lien upon the amount recovered in each action for the costs of that action and of the other.

The insurance company against whom the unsuccessful action had been brought, attached the moneys due to G. by the company against whom G. had succeeded, and the defendants claimed a lien on the judgment which had been thus attached for all their costs in both actions.

Held, reversing the decision of ARMOUR, C.J., that so far as the lien claimed by the defendants depended upon the agreement it must fail, because that agreement was nothing more than an agreement to secure costs to be incurred in the future, and the general proposition that a solicitor will not be permitted to take a security for costs to be incurred, is established beyond the reach of controversy.

Held, also, that the solicitors had no lien for the costs of the unsuccessful action upon the fund recovered

in the other, that fund not having been recovered or preserved by means of the costs incurred in the action which was lost, and the two actions not being so intimately connected as to be regarded as one. *The London Mutual Fire Ins. Co. v. Jacobs and Gordon*, 392.

See TRUSTS AND TRUSTEES.

STATION.

See NEGLIGENCE—RAILWAYS, 2.

STATUTES.

R. S. O. (1877) ch. 32, secs. 2, 6, 7.]—See MALICIOUS ARREST.

R. S. O. (1877) ch. 73.]—See MALICIOUS ARREST.

R. S. O. (1877) ch. 150.]—See COMPANY, 5.

45 Vic. ch. 22 (D.)]—See COMPANY, 1.

46 Vic. ch. 18, secs. 292, 293, and 570, (O.)]—See MUNICIPAL CORPORATIONS, 3.

R. S. C. ch. 8, sec. 111.]—See PARLIAMENTARY ELECTIONS.

R. S. C. ch. 120, secs. 20, 29, 70, and 77.]—See COMPANY, 2.

R. S. C. ch. 123, sec. 5.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

R. S. C. ch. 129.]—See COMPANY, 1.

R. S. C. ch. 129, sec. 77, sub-sec. 2, secs. 83, 86, 87, 93.]—See *In re Bolt and Iron Co.*, 397.

R. S. O. ch. 35, secs. 2, 6, 7.]—See MALICIOUS ARREST.

R. S. O. ch. 47; sec. 19, sub-sec. 2.]—See COUNTY COURT.

R. S. O. ch. 47, secs. 41, 42.]—See APPEAL.

R. S. O. ch. 65.]—*See* CREDITOR'S RELIEF ACT.

R. S. O. ch. 73.]—*See* MALICIOUS ARREST.

R. S. O. ch. 94.]—*See* REVENUE.

R. S. O. ch. 111, sec. 5, sub-sec. 6.]—*See* LANDLORD AND TENANT, 2.

R. S. O. ch. 124, sec. 2.]—*See* BANKRUPTCY AND INSOLVENCY.

R. S. O. ch. 124, sec. 9.]—*See* ASSIGNMENTS AND PREFERENCES.

R. S. O. ch. 132.]—*See* HUSBAND AND WIFE, 1.

R. S. O. ch. 143.]—*See* LANDLORD AND TENANT, 1.

R. S. O. ch. 183.]—*See* COMPANY, 4, 5.

R. S. O. ch. 184, secs. 291, 292, and 569.]—*See* MUNICIPAL CORPORATIONS, 3.

R. S. O. ch. 184, sec. 338.]—*See* MUNICIPAL CORPORATIONS, 4.

R. S. O. ch. 184, secs. 385 to 404.]—*See* MUNICIPAL CORPORATIONS, 1.

R. S. O. ch. 184, sec. 477.]—*See* MUNICIPAL CORPORATIONS, 5.

R. S. O. ch. 184, sec. 583.]—*See* MUNICIPAL CORPORATIONS, 2.

R. S. O. ch. 201.]—*See* MUNICIPAL CORPORATIONS, 4.

R. S. O. ch. 226, secs. 25 and 35.]—*See* PUBLIC SCHOOLS.

50 Vic. ch. 23 (O.)]—*See* LANDLORD AND TENANT, 1.

STATUTE OF LIMITATIONS.

See HUSBAND AND WIFE, 2 — LANDLORD AND TENANT, 2.

STREETS.

See MUNICIPAL CORPORATIONS, 1, 4, 6—*NEGLIGENCE*—RAILWAYS, 1.

SUBROGATION.

See REGISTRY LAWS.

SUBSCRIPTION.

See COMPANY, 2, 4, 5.

SURETY.

See REGISTRY LAWS.

SURVEY.

Plan part of description in deed.]—When a conveyance describes the property by reference to a plan, the plan becomes incorporated with the conveyance, and just as much part of the description as if it had been drawn upon the face of the conveyance, and to determine what passes by the conveyance, the description and plan alone are to be looked at, their construction being a question of law.

Where, therefore, lots were sold by reference to a plan, and in the plan the lots were laid out in rectangular and not in rhomboidal shape, the dividing lines between the lots were held to run at right angles to the admitted line of frontage, and the ownership of the land in dispute was determined by this test.—*Smith v. Millions*, 140.

TAXATION OF COSTS.

See TRUSTS AND TRUSTEES.

TAXES.

See ASSESSMENT AND TAXES—
LANDLORD AND TENANT, 2.

TAX SALE.

See ASSESSMENT AND TAXES.

TENANT.

See LANDLORD AND TENANT.

TRANSFER OF SHARES.

See COMPANY, 2.

TREE PLANTING ACT.

See MUNICIPAL CORPORATIONS, 4.

TRESPASS.

See MUNICIPAL CORPORATIONS, 1, 4.

TRIAL.

See McDonald v. Johnston, 430.

TRUSTS AND TRUSTEES.

Assignee for the benefit of creditors — Duty as to keeping and furnishing accounts — Misconduct disentitling to costs—Solicitor and client—Taxation by cestui que trust of bill of solicitor employed by trustee.]
—It is the duty of a trustee, or other accounting party, at all times to have his accounts ready, to afford all reasonable facilities for their inspection and examination, and to give full information whenever re-

quired. As a general rule he is not obliged to prepare copies of his accounts for the parties interested, though if, for example, the *cestui que trust* or principal lives at a distance from where the trust affairs are being carried on, or in a foreign country, it would be the duty of a trustee to give all reasonable information and explanations by letter; and even, if requested, but at the expense of the *cestui que trust*, to prepare and transmit accounts and statements.

Any one *cestui que trust* may, in the discretion of the Court, obtain an order under the third party clauses of the Solicitors' Act for the taxation of a bill of costs for business connected with the trust estate of a solicitor employed by the trustee.

Where a creditor brought an action for an account against the assignee for the benefit of creditors of his debtor after demanding copies of the assignee's accounts, but without expressing any desire or making any attempt to inspect the accounts, and without waiting a reasonable time for preparation of copies, the assignee was allowed his costs as between solicitor and client out of the balance of the estate in his hands, and in case of deficiency the plaintiff was ordered personally to pay it.

The mere fact that a trustee in rendering an account to his *cestui que trust*, claims that he has in his hands a smaller sum than is found to be due by him when his accounts are taken in Court does not disentitle him to the costs of an action against him for an account.

Judgment of ROBERTSON, J., affirmed. *Sandford et al. v. Porter*, 565.

See BANKRUPTCY AND INSOLVENCY.

VENUE.

See MALICIOUS ARREST.

VOLUNTARY CONVEYANCE.

1. *Right of creditor to whom grantor has been continuously indebted on current account to attack—Object of settlement.*]—The defendant made a voluntary conveyance to his wife of certain real estate owned by him. Without this real estate, his liabilities, among which was a debt to the plaintiffs of about \$1,500, exceeded his assets. He continued to deal largely with the plaintiffs down to the time of his failure some years afterwards, the balance then due them being about \$2,300, but much more than \$1,500 had been in the meantime paid to them.

Held, that the conveyance was fraudulent and void as against creditors.

Per HAGARTY, C.J.O., and OSLER, J. A. In the case of a continuous dealing and account where the customer goes on paying with one hand on general account, and purchasing fresh goods with the other hand to an equal or larger amount, with a constantly increasing balance against him, the creditor is, from the commencement of such dealing, so long as his ultimate balance remains unpaid, in a position to attack an alleged voluntary conveyance.

Per MACLENNAN, J. A.—The settlement having been made with the object of putting the property beyond the chances and uncertainties of the business in which the settlor was engaged, and which he continued to carry on until insolvent, must be regarded as having been made with intent to defraud the creditors of that business, and it was unneces-

sary to prove any old debt still unpaid.

Decision of BOYD, C., affirmed. *Ferguson v. Kenny*, 276.

2. *Right of creditor with whose knowledge and assent it is made to complain—Mortgage to secure past and future advances—Future advances after notice of voluntary conveyance.*]—Where a debtor at the express instance and under the advice and with the assent of a creditor who holds, to secure past and future advances, a mortgage upon certain of the debtor's land, makes a voluntary conveyance of his equity of redemption in that land to his wife, that creditor cannot afterwards contend that the conveyance is voluntary and void as against him.

Such a mortgagee cannot charge against the land under his mortgage any advances made after notice of the conveyance.

Hopkinson v. Rolt, 9 H. L. C. 514, and similar cases, considered and applied. *Blackley v. Kenny*, 522.

WAIVER.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

WAY.

See *Duncan v. Rogers*, 3—MUNICIPAL CORPORATIONS, 1, 4, 6—RAILWAYS, 1.

WILL.

Cujus est solum ejus est usque ad coelum.]—A testatrix, being the owner of certain lands and premises upon which a block of

buildings was erected, devised the property in two parcels, describing the buildings thereon as being in the occupation of certain tenants. The description of one parcel included an alley-way running through the centre of the block, but the rooms built over the arch of the alley-way were structurally a part of, and were used with, a store that formed part of the other parcel, to which a right of way over the alley-way was given.

Held, BURTON, J. A., dissenting, affirming the judgment of the Common Pleas Division, that the presumption "*Cujus est solum ejus est usque ad coelum*" is a rebuttable one, and that under the circumstances

the rooms in question did not pass with the land. *Potts v. Boivine*, 191.

WINDING-UP ACT.

See COMPANY, 1, 2, 4, 5.

WRIT OF EXTENT.

See REVENUE.

WRONGFUL DISMISSAL.

See MASTER AND SERVANT.

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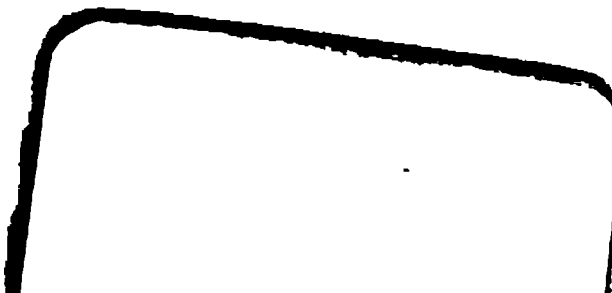
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